No. 89-____

89-860

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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November 27, 1989

QUESTIONS PRESENTED

1. Whether genuine issues of material fact exist so as to preclude entry of summary judgment ten years following filing of cross-motions for summary judgment?

2. Whether the United States Civil Service Commission (now Office of Personnel Management) illegally exempted itself from compliance with Title 5, Code of Federal Regulations Part 713 for processing complaints of discrimination by Petitioner and all other persons against its Bureau of Personnel Investigations (BPI) before, and even after, remand of this case from the District Court.

3. At what point after filing a SF-171, Personal Qualifications Statement, would Mr. Brees (and equally all other persons seeking federal employment) become an "applicant for employment" entitled to to the protection of 5 CFR Part 713?

4. Whether Mr. Brees was denied full and fair hearings in the administrative process after remand from the District Court?

CERTIFICATE OF COUNSEL REQUIRED BY RULE 21(b) OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT

The undersigned counsel of record for the petitioner certifies that the following listed parties appeared upon the pleadings below:

I. As plaintiff (petitioner) herein:

Earl Roland Brees
Estate of Earl Roland Brees

II. As defendants (respondents) herein:

Robert H. Hampton, individually and as Chairman of the United States Civil Service Commission

Frederick B. Dents, individually and as Secretary of Commerce

Bert A. Gallegos, individually and as Director of the Community Services Administration (formerly the Office of Economic Opportunity)

Robert H. Drummond, Jr., individually and as Chairman of the United States States Civil Service Commission

Alvin J. Arnett, individually and as Director of Economic Opportunity.

Tracy E. Mulligan

Tracy E. Mulligan, Esquire

Attorney of Record for Petitioner

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INTRODUCTION

The administrator of the estate of the late Earl R. Brees hereby petitions this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals,

entered on June 13, 1989, is reported at 872 F.2d 111 (D.C. Cir. 1989), and is presented in the Appendix ("App."), 5a, et seq. The petition for rehearing and the suggsetion for rehearing en banc, filed July 28, 1989, were denied by Orders dated August 29, 1989 and appear in the Appendices hereto at 3a and 1a, respectively. The opinion of the District Court for the District of Columbia, which the Court of Appeals affirmed, is not reported; unpublished opinion appears at App. 55a, et seq.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.2 of the Rules of this Court. Jurisdiction of the District Court was predicated upon 42 U.S.C §2000e-16.

STATUTES AND REGULATIONS INVOLVED

Petitioner's claims arise under the Civil Rights Act of 1964 as amended to include federal workers, 42 U.S.C. §2000e-16 and the regulations promulgated thereunder, which were the found at 5 C.F.R., Part 713. The relevant texts of these appear at App. 236a et seq. and _____ et seq., respectively.

STATEMENT OF THE CASE

This case arises under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-16. Earl Brees, the petitioner, was a disabled veteran honorably discharged from military service in 1960. During the next six years, he obtained a college degree and worked from time to time in both federal civil service jobs and in the private sector. In 1967, Mr. Brees worked for a private travel company, Travel Consultants, Inc., as

controller. In May 1967, he signed checks drawn on his company's account, totalling over $80,000, all payable to "J.R. Bishop," his wife's maiden name. His company became aware of his action. On May 27, 1967, he was arrested for embezzlement; the charge was changed to forgery, and then to false pretenses. On September 15, 1967, Mr. Brees pled guilty to the misdemeanor charge of "attempted false pretenses." He received a one-year sentence (which was suspended), and was placed on probation for a year.

On June 8, 1967, Mr. Brees was hired by the Interior Department's Bureau of Land Management as an operating accountant, GS-9. He sought transfer to the Accounting Systems Branch, Finance Division, of the OEO. On May 25, 1967 (two days prior to his arrest), he had submitted an employment application to OEO.

Question 37 of the application asked: "Have you ever been convicted of an offense against the law or forfeited collateral or are you now under charges for any offense against the law?" Mr. Brees answered, "No".

On August 27, 1967, Mr. Brees was transferred from the Interior Department to OEO, where he was employed as a GS-11 accountant. On August 28, he signed an appointment affidavit ("Standard Form 61"), which contained the following question: "Since you filed [your] application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Mr. Brees responded, "No". On the same day his fingerprints were taken and a routine National Agency

Mr. Brees performed his job satisfactorily, and on October 22, 1967, he was promoted to a GS-12 position. On March 1, 1968, the Civil Service Commission notified the OEO Personnel Security Officer that the National Agency Check and Inquiry had revealed Mr. Brees' arrest record. On March 6, OEO requested that the Commission conduct "a full field" investigation of Mr. Brees.

By letter of June 27, 1968, OEO notified Mr. Brees that it proposed to remove him from his position because he had falsified his Standard Form 61. On July 19, after receiving his reply, OEO dismissed him, effective August 3. Beginning August 2, 1968, Mr. Brees sent letters contending that had he been black, he would have been granted rehabilitated offender status and would not have been fired.

He appealed to the then Civil Service Appeals Examining Office ("C.S.C. A.E.O.") which on January 21, 1969, it aside Mr. Brees' removal, on the ground that the Standard Form 61 he had signed in August required him to disclose only events that occurred after the date that OEO had received his initial application (which, although dated May 25, was not in fact received by OEO until August). On February 4, petitioner was reinstated to his position. At the same time, he received a letter, dated January 31, proposing his removal on different grounds (fraud and deception in obtaining federal employment, and criminal conduct). He was dismissed on March 5, effective March 7. Mr. Brees appealed within OEO and was given a hearing before a Hearing Committee in November and December 1969. The Committee unanimously recommended his reinstatement to a

less sensitive position, concluding in its report of March 6, 1970 that OEO's action in discharging him a second time was "not taken in good faith." The Committee found that "[r]ather than reinstat[ing Mr. Brees] and try[ing] to live with the situation, OEO made the decision to terminate him again, come what may," even though Mr. Brees was a "superior worker." The Hearing Committee concluded:

> We find that the underlying cause for the second discharge was the agency's hostility to Mr. Brees which had built up since the first discharge and which he had exacerbated by his victory at the Civil Service Commission. We find that the agency rationalized its predetermined decision not to reinstate [Mr. Brees] * * *.

On March 31, 1970, however, OEO issued a final agency decision sustaining the discharge, but on the ground of criminal conduct.

Mr. Brees again appealed to the Appeals Examining Office, which rescinded OEO's decision and remanded the discharge case to the agency with instructions to process several discrimination complaints that Mr. Brees had filed, but that OEO had not yet acted upon. This agency delay violated regulations requiring that discrimination complaints be processed within 60 days in cases where hearings were not held, and within 90 days where hearings were held, see 5 C.F.R. § 713.218(a) (1969); 5 C.F.R. § 713.220(a) (1970). On January 21, 1971, the Commission's Board of Appeals and Review rejected OEO's appeal from the Appeals Examining Office decision, and on February 11, 1971, OEO began processing petitioner's discrimination complaints. An equal employment opportunity ("EEO") counselor was appointed in April 1971, and a report completed

in June. The EEO counselor stated that he could not determine whether OEO had discriminated against Mr. Brees on the basis of race, because the agency refused to make available the criminal records of black felons so that the treatment they received could be compared with that of Mr. Brees. Nevertheless, the counselor found that "the sequence of events point[s] quite strongly to the possibility of discrimination in the form of reprisals against Mr. Brees because he filed a complaint of discrimination." As support for his conclusion, the counselor noted that "[i]t is difficult to understand whe OEO would be unwilling to simply transfer Mr. Brees to a position unrelated to finance." On June 30, 1971, OEO requested the Commission to furnish an investigator for Mr. Brees' EEO claim against the agency, and on July 21, OEO was notified that an EEO

investigator had been obtained from the U.S. Information Agency.

Meanwhile, between May 1968 and February 1969, the Washington Area Examining Office of the Civil Service Commission received several applications for employment from petitioner. As was customary in such cases, the applications were referred to the Commission's Bureau of Personnel Investigatoin ("BPI") for a determination of the applicant's "suitabililty" for federal employment. On March 5, 1969, BPI issued a show-cause letter to Mr. Brees informing him that he had 15 days to reply to certain information which had surfaced during the investigation of his suitability. BPI received and considered Mr. Brees' reply. By letter dated March 28, 1969, Stanley N. Taylor, then Chief of the Division of Adjudication and Appraisal at BPI, notified Mr. Brees that on the basis

of his "dishonest conduct," his applications for federal employment had been rated ineligible.

On April 16, 1969, Mr. Brees appealed the rating to Kimbell Johnson, Director of BPI, who affirmed the decision, stating that "[b]ecause of the evidence and recency of your violation of the trust and confidence in employment, the Commission cannot at this time accept your applications for certification to government agencies for employment." Mr. Brees further appealed his rating to the Commission's Board of Appeals and Review, again raising the issue of racial discrimination. On June 3, 1969, the Board sustained the finding of the Director.

In July 1971, Mr. Brees and OEO officials began discussing the settlement of his claims against the agency. These negotiations culminated in an agreement

dated August 6, in which OEO promised to cancel Mr. Brees' second removal (dated March 7, 1969), and to reinstate him with back pay (some $19,000). Mr. Brees pledged to take annual leave from August 9, 1971, until October 19, 1971, and to take unpaid leave thereafter until September 6, 1972, at which time he would resign (unless he chose to do so earlier). Mr. Brees agreed that this was in settlement of his claims arising out of the personnel actions taken against him by OEO.

In the summer of 1971, Mr. Brees also became aware of a memorandum drafted by Stanley N. Taylor, Chief of BPI's Division of Adjudication and Appraisal, dated July 7, 1971, and addressed to his supervisor, Kimbell Johnson, Director of BPI. The Taylor memorandum contained allegedly defamatory information that would have damaged Mr. Brees' employment prospects.

For example, it said that he had been convicted in United States district court on the charge of false pretenses, while in fact he had pled guilty to attempted false pretenses in D.C. Superior Court. The memorandum went on to characterize Brees' appeals as "perver[sion] of the civil service appeals process, and commented that "it is absolutely asinine to state that Brees had been 'cleared' by anyone."

On October 28, 1971, Mr. Brees attempted to return to work at OEO and was refused. The next day, he attempted to withdraw his resignation, and this request was also denied by the agency. Mr. Brees then appealed to the Commission, alleging that his resignation was involuntary and that he should be allowed to withdraw it. The Commission determined on May 4, 1973 that the resignation was voluntary and that the agency had valid reasons for not

granting the withdrawal request. The district court later remanded the case to the Commission for a full hearing on the issue of voluntariness; the Commission affirmed its earlier decision that the resignation was voluntary.

In 1973, Mr. Brees applied for a temporary position as a computer specialist in the Office of Telecommunications at the Department of Commerce. While his application was being subjected to a pre-appointment check, the Department decided to abolish the position. Appellant charges that the Department acted after receiving false and unfavorable information about Mr. Brees from BPI through improper channels. The Department's Investigations and Inspections Staff conducted an investigation, and a hearing was held on September 18, 19, and

24, 1975. After evaluating all the evidence, the complaints examiner concluded on January 13, 9176 that "the agency's inaction with erspect to complainant's applications for various positions was unrelated to complainant's discrimination complaint," and recommended that Mr. Brees' complaint be dismissed. On appeal, the Department's Acting Assistant Secretary for Administration agreed. Later, a different complaints examiner appointed by the Civil Service Commission found that there was no evidence that any improper release of information by BPI was approved by BPI officials or even known to them.

In late 1973, Mr. Brees submitted additional applications for employment with Commission examining offices in Washington, Oklahoma City, Atlanta, Pittsburgh, and St. Louis. The Washington, Atlanta, and Pittsburgh of-

fices submitted requests to BPI for determinations of suitability, triggered by Mr. Brees' previous rating of unsuitability and his 1969 arrest. Between December 6, 1973, and January 4, 1974, and again between February 6 and 7, BPI conducted investigations of Mr. Brees' suitability. As a result thereof, Mr. Brees was invited to attend a meeting in April to offer any comments, explanations, or information he wished BPI to consider. Mr. Brees replied that on advice of counsel he preferred to respond via interrogatories rather than in person. By letter dated June 20, 1974, the Commission sent Mr. Brees a statement of information that required his comment, to which he replied on July 1. On June 27, 1974, Mr. Brees filed suit in the U.S. district court, and action on the suitability determinations was suspended until the U.S. Attorney later requested that they be

completed. In 1975, Mr. Brees received a positive suitabililty rating. In December 1973 and January 1974, Mr. Brees filed a series of EEO complaints against BPI and the Commission, alleging racial discrimination and reprisals against him for filing earlier complaints. The Commission initially took the position that 5 C.F.R §713.212(a) (1974) permitted complaints of discrimination to be filed against an agency only by its employees or applicants for positions within that agency, and did not authorize complaints such as the one Mr. Brees attempted to file directly against BPI. On November 19, 1975, however, the district court remanded the complaints to the Commission and ordered that they be processed. An investigation was conducted from January 5 through January 28, 1976. Efforts at informal resolution were unsuccessful, and by

letter of June 24, 1976, Mr. Brees requested a hearing on his allegations. The hearing was conducted on April 12, 21, 25-28, June 22, 27-29, and July 6-8, 1977. Mr. Brees was represented by counsel. The complaints examiner concluded that "[t]he evidence presented fails in each instance to show that the actions charged stem from discrimination and/or retaliation for earlier complaints," and recommended that a decision issue "that there was no discrimination and/or reprisal against Mr. Brees," On September 8, 1977, the Civil Service Commission announced its final decision in which it adopted the findings and recommendation of the complaints examiner.

The district court proceeding then resumed. After the Commission's decision on remand, Mr. Brees deposed a number of witnesses, and the government successfully

moved for a protective order. On January 18, 1978, the district court granted Mr. Brees' oral motion for leave to file a motion for summary judgment by February 20, 1978; Mr. Brees later sought and was granted extensions. During February and March 1978, Mr. Brees filed twelve motions for summary judgment, and on April 19, defendants submitted their response to petitioner's motions and moved for summary judgment as well. Over the next several months, the parties sparred over appropriate statements of stipulated material facts. On June 5, 1979, Mr. Brees moved to compel the Commission and OEO to file the complete administrative record; the defendants filed their response on July 11.

After six years had elapsed, on October 5, 1984, Mr. Brees requested a settlement conference and submitted a supplemental

memorandum of points and authorities in support of his still pending motions for summary judgment. The court on February 21, 1985, denied Mr. Brees' request to refer the case to a magistrate for settlement proceedings, and directed the parties to produce a complete administrative record, which record had been sent to storage by the office of the clerk, where, evidently, it was destroyed. Thereafter, on October 2, 1985, the court issued a memorandum and order directing Mr. Brees to show cause within 30 days why his complaint should not be dismissed with prejudice. Mr. Brees responded to this order on October 28, and two days later submitted an outline of the administrative record.

In 1987, Mr. Brees applied to this court for a writ of mandamus to order the

district court to issue its decision, and on May 1 of that year, more than nine years after the cross motions had been filed, the court of appeals denied the petition, commenting that "[w]e are confident that the district court will act with all due haste." In re Earl Roland Brees, No. 87-5086 (D.C. Cir. May 1, 1987); App. 53a. On July 2, 1987, counsel notified the district court that Mr. Brees had died. The following year, his estate sought another writ of mandamus, which was rendered moot when, on July 20, 1988, the district court granted summary judgment in favor of the defendants.

REASONS FOR GRANTING THE WRIT

I. GENERALLY: THE TEN YEAR DELAY

The import of this case arises from the inaction of the district court, in violation of statute, 42 U.S.C. §2000e-5(f)(4) and (5), for a period of ten

years: from March 1978 until June 1988. Brees v. Hampton, 877 F.2d 111, 116-117 (D.C. Cir. 1989); App. 49a-51a. It arises from the summary disposition effected by the district court on a 7,000 page administrative record. App. 84a. It arises from the death of Mr. Brees during the period of the district court delay. This is the classic case of justice delayed, justice denied. App. 7a, 51a.

The import further stems from numerous factual inconsistencies which both the district court and the court of appeals declined to view as integral to the claim of Mr. Brees, so as to force trial; instead both allowed the grant of summary judgment to the government. Its import also evolves from the rationalized approval, by both courts, of the government violating its own regulations, as well as statute.

II. Genuine issues of material fact abound: Petitioner's resignation from O.E.O. was involuntary and the August 1971 Agreement was voidable at petitioner's option.

The primary basis for the court of appeals affirming the district court in is case was the absence of any genuine issue of material fact in respect to the validity of the August 6, 1971 settlement agreement. App. 28a-29a. That agreement came about under the following circumstances: On July 22, 1971, the agency informed the petitioner that absent an order from the Civil Service Commission (C.S.C.), he would never again work at the Office of Economic Opportunity (O.E.O.). Further the agency stated that, provided the petitioner resign, it could reinstate him and restore to him his back pay from March 7, 1969, to date. Administrative Record, filed in the district court on or about 8 November, 1974, (hereinafter A.R.1.), pp.

224 and 286. Prior to August 5, 1971, O.E.O. requested the informal advice of the C.S.C. by and through its Office of General Counsel, regarding the validity of the proposed agreement to reinstate the petitioner and to restore to him his back pay, as aforesaid. Ad. Rec., filed 14 November, 1977, (hereinafter A.R.2), p. 1079. The Office of General Counsel of the C.S.C. informed O.E.O. that it believed such an agreement could be accomplished. A.R.2., p. 1080. The petitioner, by letters dated July 28, 1971, and July 20, 1971, tendered to the O.E.O. (The Office of its Director); the Equal Employment Opportunity Investigator appointed to investigate his complaints of discrimination by O.E.O.; and the C.S.C. (the Office of its Chairman) on July 30, 1971, statements of his belief that he was being coerced into executing

belief that he was being coerced into executing an agreement by which he was to be reinstated to his position at the O.E.O., restored his back pay and by which he was to tender his resignation at some future date, inter alia. A.R.1., p. 283. Both the district court and the court of appeals overlook this fact.

The court of appeals finds as a matter of fact that it was the petitioner two requested the settlement meeting. App. 32a. This appellate fact-finding discredits petitioner's contrary testimony to the effect that two agency personnel had told petitioner prior to July 22, 1971, that the agency had already decided to reinstate him, mostly because of the E.E.O. counsellor's activities. Ad. Rec. 2, pp. 1645-1649. And see report of E.E.O. Investigator Hunt, Ad. Rec. 2, pp. 232-238, which corroberates petitioner

in this. The idea of reinstatement came from EEO Counselor Hunt's dialogue with OEO management; not from Brees' suggestion, as the court of appeals finds. App. 32a. At a minimum, these differences underscore the existence of genuine factual issues. The O.E.O. prepared and executed the order for reinstatement and restoration of back pay on August 5, 1971. A.R.2., p. 397.

The next day, on August 6, 1971, the petitioner and the agency entered; into the Agreement by which the agency was to effect his reinstatement, restore his back pay pursuant to sub-chapter IX of the Back Pay Act, 5 U.S.C. §5596, and by which he was to resign and withdraw certain E.E.O. complaints then pending, while in turn the agency would withdraw its removal action against him. A.R.1, p. 315. All during the course of the negotiations which culminated in the Agreement of August 6,

1981, the petitioner was without representation by legal counsel.

During October of 1971, the petitioner decided to withdraw his resignation. At the administrtive hearing, held pursuant to the order of remand of the district court, the uncontradicted agency testimony was that the reasons set forth in the agency letter of November 12, 1971, as to why the agency would not allow him to withdraw his resignation were not the real reasons of the agency. Robert L. Trachtenberg, former Deputy General Counsel for O.E.O., engaged, in his testimony of 6 May 1976, in the following colloquoy:

> Mr. Mulligan: In view of the provisions of that regulation, [5 C.F.R. §715.202(b), of May 28, 1971] under what legal authority did the agency deny Mr. Brees' withdrawal of his resignation?

> Mr. Trachtenberg: The legal authority basically is as follows: This regulation says that the agency may decline the employee's request to withdraw his resignation, where valid reasons exist. The controlling reason in this case always was Mr. Brees' conduct, not his criminal conduct, but his conduct with the government officials that he had been dealing with, you know, throughout this process.
>
> You know I state, and I can't state it enough, you know, we were fully prepared at all times to go ahead on the adverse actions and on the discrimination complaint, but you know, Mr. Brees touched on the matter of libeling or threatening or whatever, harassing, that this was a way in which to resolve the problem and hopefully not have to deal with Mr. Brees further.... [A.R.2., p. 1002.]

On 10 May, 1976, Ernest Russell, Associate Director for Administration of the O.E.O. at all relevant time periods to the negotiation of the Agreement of August 6, 1971, and the signatory of said

Agreement on behalf of the agency, testified that the plaintiff

> had been employed -- he had difficulty - at least this would provide him with the record which showed that he resigned as opposed to being fired from the agency. It also would provide him monies to take care of his wife and his family because he hadn't worked in years sufficient to have the earnings that he had when he had been employed as a permanent employee of O.E.O. [A.R.2, p. 1280.]

Generally all resignations submitted during the summer of 1971 were governed by 5 C.F.R. §715.202, which read as follows:

> (a) General. An employee is free to resign at any time, to set the effective date of his resignation, and to have his reasons for resigning entered in his official records.
>
> (b) Withdrawal of resignation. Except as provided in this paragraph, a resignation is binding on an employee once he has submitted it. An agency, in

> its discretion, may permit the employee to withdraw his resignation at any time before it has become effective. An agency may decline a request to withdraw a resignation before it has become effective only when it has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason. [33 F.R. 12482, Sept. 4, 1968, as amended at 36 F.R. 9675, May 28, 1971; emphasis supplied.]

The Federal Personnel Manual Supplement 752-1, sub-chapter S1, Paragraph S1-2a(2), set forth the C.S.C.'s own policy with respect to the voluntariness of an action, including resignation requested by an employee, as follows:

> The commission holds that an action requested by an employee is voluntary only if the employee has freedom of choice. The general principle is that an action is voluntary if the employee is free to choose, under-

> stands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. [Emphasis supplied.]

The petitioner had asked the agency to allow him to resign as of September, 1973. The agency would not allow that date, and then the agency set the date of his resignation as September 6, 1972. The agency's policy, as quoted above, is written in the conjunctive: If any one of the criteria utilized to determine the voluntariness of an action is not met, the action must be considered to be involuntary. Further, 5 C.F.R. §715.202(a) specifically states that the effective date of a resignation is a matter the employee is free to set. The O.E.O. having set the date of the petitioner's resignation renders the resignation, ipso facto, an involuntary one.

The reasons set forth in the November

12 letter were, as noted above, not to be the real reasons; rather, "the controlling reasons in is case always was Mr. Brees' conduct, not his criminal conduct, but his conduct with the government officials that he had been dealing with, you now, throughout this process." Where the reasons for refusing an employee's request for withdrawal of his resignation relate to his behavior on the job, which behavior, as here, would constitute grounds for any adverse action, such reasons, pursuant to 5 C.F.R. §715.202(b), cannot be considered as "valid reasons." And see Decision Number NY752B70027, 15 November 1976, Federal Employee Appeals Authority. Another issue of fact exists for determination by the trier of fact.

The Agreement of August 6, 1971, sets forth the obligation of O.E.O. to reinstate the plaintiff to his position as

Systems Accountant, GS-510-12, on a date even with or subsequent to said Agreement. At the time of the execution of the Agreement, the agency had already, the day before, reinstated the petitioner. The court of appeals overlooks this fact. Further, by virtue of the C.S.C. A.E.O. order of August 17, 1970, the agency was under a legal obligation to investigate his Title VII claims and issue a new appellate decision, the earlier appellate decision having been rescinded. That order had been affirmed by B.A.R. on January 21, 1971. Further, the agency was under a legal obligation to comply, in good faith, with the C.S.C. A.E.O. order of August 1969 ordering petitioner's reinstatement which had been given only token compliance (one month).

The Agreement of August 6, 1981, in paragraph numbered Two (2), further "obli-

gated" the O.E.O. to restore the petitioner "all back pay to which he is legally entitled from the time of [his second] removal until the date of is reinstatement." This obligation of O.E.O. was in furtherance of the affirmation of the plaintiff set forth in paragraph numbered Six (6):

> this Agreement is in resolution of the adverse action [removal] taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual 752....

The standard form by which the petitioner was restored to his position on August 5, 1971 -- one day before the execution of the subject Agreement -- identifies the authority by which the restoration of back pay was to be made as Sub-Chapter IX of the Back Pay Act. Under that sub-chapter (unless the predicates were such that the back pay to be restored was for

an involuntary act of the plaintiff) a back pay restoration had to be made pursuant to 5 U.S.C. §5596.[1] Sub-section (b) of that statute limits payment of retroactive compensation only to:

> [A]n employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal ... of all or a part of the pay, allowances, or differentials of the employee .... [Emphasis supplied.]

And see Opinions of the Comptroller General,

1/ In any event the back pay offered only settled the adverse action. The subsequent withdrawal of the E.E.O. complaint of plaintiff against O.E.O. pursuant to the fifth paragraph of the Agreement, in combination with the caveat that the Agreement was not to be construed as a finding of discrimination could not on August 5, 1971, be a valid predicate for back pay under 5 U.S.C. §5596(b), as the Agreement had yet to be executed.

B-185239 (October 8, 1976); B-180010.05 (January 2, 1976); and B-185239 (June 5, 1974). The agency never made such a determination as part of this Agreement, nor had such a determination been made by any other "appropriate authority." Past consideration is no consideration. "It of course goes without saying that a promise to do a thing which the promisor is already bound to do is not a good consideration upon which to found promise." Littlepage v. Neals Publishing Company, 34 App. D.C. 257, 264 (1910). And see, United States v. Bridgeman, et al., 173 U.S. App. D.C. 150, 523 F.2d 1099 (1975), regarding performance of an existing legal duty as constituting invalid consideration for a subsequent Agreement. Having reinstated petitioner and authorized back pay on the day before the Agreement was executed, no valid consideration existed for the Agree-

ment of August 6, 1971, and the Agreement is void or voidable at the option of the petitioner. The court of appeals addresses this issue, but finds no problem.

This point is further reinforced by the fact that whether a personnel action is unjustified or unwarranted can only be determined by looking to the factual predicate for that personnel action; it cannot be determined by events which take place two years later. Thus, when on July 22, 1971, the agency stated it could restore back pay, it had to be basing that decision that decision on the events underlying petitioner's second removal in 1969, not as the court of appeals speculates, some underfined procedural error. App. 38a-39a.

If events of two years earlier are the only possible basis for a determination of the unwarranted or unjustified

nature of the petitioner's removal, then it was impossible for the agency to bargain with the petitioner. Conversely, for petitioner to attempt to bargain with the agency on this point -- no matter what appearances the agency manifested in its negotiations with him -- was for the petitioner to engage in a useless act: The unjustified or unwarranted nature of the removal could not be altered by bargaining. The petitioner was either entitled to restoration and back pay, or he was not. The inability of the agency to bargain further vitiates the legal sufficiency of the consideration it offered to support the August 6, 1981 Agreement. In Colorado National Bank of Denver v. Bohm, 286 F.2d 494 (9th Cir. 1961), the court affirmed "the fundamental common law principle that consideration must be bargained for -- it must be

the thing which the parties agree shall be given in exchange for the promise." Id., p. 496. The agency was in no position to bargain. Again, the Agreement is void or voidable at the option of the petitioner.

There is also evidence that the agency overreached the petitioner in arriving at the August 6, 1971 Agreement. This is indicated by the fact that the agency knew of the financial difficulties of the petitioner and that he was not represented by legal counsel. Further, as the affidavits of Mr. Trachtenberg and Mr. Russell show, the petitioner had been informed that absent an order from the C.S.C. to the contrary he would not be restored to his position. This statement was made to petitioner even before the 5 C.F.R. §713.216 investigator had been appointed, formally, by the agency to

investigate the complaints of discrimination which the C.S.C., B.A.R. had directed the agency to investigate. In essence, the agency had predetermined the result of the B.A.R. ordered E.E.O. investigation; what more evidence of, at the least, a reprisal or retaliation for invocation of civil rights law is necessary.

Given these knowledges and behaviors of the agency as to the predicates to the Agreement of August 6, 1971, that Agreement for these reasons, too, is voidable at the option of the petitioner.

In order for an agreement to be enforceable, it must not be in violation of any statute, law or regulation; nor must it have as its objective an unlawful object. Jordan v. Axicom Systems, Inc., 351 F. Supp. 1134 (D.D.C. 1972). The Agreement of August 6, 1971, contained a

provision which made it "irrevocable." 5 C.F.R. §715.202 (1971)[2/] gives to the petitioner the absolute right to request the withdrawal of is resignation at any time before its effective date. The regulations allow the agency to reject an application to withdraw only if the agency can specify a valid reason to deny the request and explain that reason to the employee. In the instant case, the Agreement violates this regulation on its face, since it simply provides that it is "irrevocable." And as discussed above, the real reasons were not given to petitioner. As such, the Agreement is unenforceable since it violates a specific Federal regulation

---

2/ The court of appeals, App. 39a-40a, asserts that certain language was added in 1973 to this regulation. The language at issue was added in May of 1971. The court erred as a matter of fact, and consequently, as a matter of law.

and the public policy articulated therein. Le John Manufacturing Co. v. Webb, 96 U.S. App. D.C. 161, 222 F.2d 48 (1955). Again, it is voidable at petitioner's option.

In sum, factual issues abound in respect to whether petitioner had the legal right to void the purported Agreement of August 6, 1971. Summary judgment was wholly inappropriate.

The Court noted that the "Appellant maintains that the background check of Mr. Brees conducted in 1968 and 1969 were discriminatory," and then adopts as dispositive the conclusions of the EEO complaints examiner "that neither the initiation nor the outcome of the 1969 suitability determination appears to have been either discriminatory nor regulatory." Yet the Administrative record shows that the initiation of the 1968 investigation was undertaken after BPI had first rejected Standard Form 85, used to request investigations for non-sensitive positions, which was properly executed by both Mr. Brees and Mr. Willis, and then accepted a SF-86, used only for "sensitive" positions, containing a false certification by Mr. Willis, Security Officer of OEO, that the position was "sensitive", and without the required signature of Mr. Brees. (Extract

of SF-86 is at Appendix, page 219a). This fraudulently initiated investigation was the basis for BPI's denial of "suitability" for the next six years, during which BPI disregarded the evidence of "rehabilitated offender" criteria established by CSC -- successful work experience, additional education, good conduct while living in the community, -- all of which Mr. Brees accomplished between 1967 and 1969 (Appendix, page 252a) and subsituted its own, unpublished criteria, applicable only to Mr. Brees, that Mr. Brees had shown no "remorse" for the offense, described above, a white collar crime which resulted in conviction of a misdemeanor, imposition of sentence suspended. The BPI position is clearly set forth in the "Taylor Memorandum", 7 July 1971, at Appendix, page 258a. Further, during that time, convicted felons, on work-release programs from

Federal and District of Columbia prisons, were being found "suitable" by BPI. Appendix, p. 227a. and infra.

Appellant respectfully submits that a "fair-minded jury could return a verdict for the appellant on the evidence presented."

The Taylor Memorandum, dated 7/7/71, (Appendix p. 258a), shows the animosity generated by appellant's repeated complaints of discrimination, against BPI.

Two years later, in October 1973, BPI blocked Appellant's employment at Commerce by telling their security officer that BPI "was considering debarring Brees." Testimony at the Commerce Hearing showed that Brees would have been hired by Commerce in October 1973 for one of the various positions he had applied for, ranging from grade 5 to Grade 12, absent that message from BPI. The Court erred in finding that

Brees' non-employment at Commerce was because the position he applied for had been abolished. That action was taken on Mr. Brees' application at the Bureau of Retirement and Occupational Health (BRIOH) an element of CSC itself.

From 1973 to 1975 BPI kept Appellant off all registers under their direct control (GS-5 through GS-12) by simply not completing the "Merit 13" investigation initiated in 1973. The Circuit Court found this innocuous delay. The testimony at the CSC hearing record showed that, absent intervention by the Justice Department (Letter January 10, 1975, Arnold T. Aikens, Assistant U.S. Attorney to Anthony L. Mondello, General Counsel, CSC, (Appendix, p. 215a) 267-268 BPI could (and inferentially would) have continued the "unsuitability" rating for the indefinite future, as shown by the following testi-

mony of Mr. George F. Mattox, Assistant Chief, Division of Adjudication, Bureau of Personnel Investigation, U.S. Civil Service Commission.

> Q [MR. MULLIGAN] * * * If the letter from the U.S. Attorney's Office had not suggested or advised the General Counsel's Office to continue with the process of his eligibility, is there any other mechanism in regulation procedure or practice that would have led the Bureau of Personnel Investigation to resume the processing of Mr. Brees' application?
>
> A [MR. MATTOX] I know of none.
>
> Q Is the letter that you have referred to by way of identification, a letter dated January 10th, 1975 * * *.
>
> MR. MATTOX: Yes, sir, this is the letter on Page 2 -- this was the direction to the Office of General Counsel that we proceed with the adjudication. On receipt of the General Counsel's file -- the file from them and I don't whether there was some instruction or not -- we proceeded with the adjudication.

The Circuit Court's conclusion that Mr. Brees was afforded an adequate remedy by the remand for hearings on his long-unprocessed complaints of discrimination against OEO and CSC is not supported in the record.

In neither of those hearings were stastical comparisons made, despite Mr. Brees' demands for this. Yet, anomalously, CSC demanded that the Commerce develop statistical comparisons before the Hearing was allowed to start, stressing that the statistical comparisons were vital to processing a discrimination complaint under 5 CFR Part 713. Letters from CSC (FEAA) to Commerce, twice demanding better statistics are at Appendix 239a and 245a.

In the CSC remand hearing (Ad. Rec. filed October 5, 1977), the Complaints Examiner accepted the statements of government witnesses, none of whom claimed any

expertise in computers, that statistical data was not maintained by CSC and a manual search of 3 to 5 million records would be required. She disregarded Mr. Brees' testimony that statistical data could readily be developed with only limited "manual" work from data already in the CSC computer systems, (Appendix, pp. 176a - 211a) explaining in detail how it could be done. Mr. Brees' qualifications included a Master's Degree from American University in the computer field, and employment in computer operations at OEO (Appendix, p. 252a). The Court adopted the Complaint's examiners' findings.

In the CSC hearing on remand deletions were made in the investigative file furnished Mr. Brees, although the complete file was forwarded to the Agency. The Complaints Examiner and the Court found this acceptable. Yet, contemporaneously,

the CSC, in implementing 5 CFR Part 713, had set aside a HUD decision because the complainant was not furnished the complete investigative file. The letter from Mr. Lowell, Deputy Executive Director of CSC, to Housing and Urban Development (at Appendix, p. 274a) was proffered by Mr. Brees in the CSC hearing as evidence of CSC policy, but was denied admission into evidence by the Complaint's examiner (Ad Rec. filed October 5, 1977, p. 667-669).

The OEO hearing on remand not only failed to include statistical comparisons, but by brazenly withheld testimony, condoned by the Complaints Examiner. One of the principal architects of the August 6, 1971 Agreement, was the Associate Director of Administration for OEO, Mr. Russell. He had also been designated to make the final decision on Brees' appeal within OEO. In a strange hearing scene, Mr. Rusell

was allowed to have a government attorney sitting in the witness box with him, whispering in his ear before he answered each question on cross-examination, "whether or not the witness recollected or did not recollect the answer". The hearing examiner, Mr. Streb, approved the procedure and allowed it to continue throughout the rest of Mr. Russell's testimony.

The following is from a transcript of the Hearing:

> MR. MULLIGAN: Therefore, I ask whether or not Mr. Werksman was with the Office of Economic Opportunity and may be a potential witness in this case.
>
> APPEALS OFFICER STREB: All right. Would you answer please?
>
> MR. WERKSMAN: [Attorney sitting in the witness box with Mr. Russell] I was in the Office of General Counsel of the Office of Economic Opportunity from 1964to 1967. At no time during

> that period did I have any connection with Earl Brees or this case.
>
> I was in the Office of General Counsel, again, from 1971 to 1972 at which time I had no connection whatsoever with this case. * * *
>
> I know nothing about the Brees case. I have given Mr. Russell no advice whatsoever in connection with what actually happened in the Earl Brees case.
>
> MR. MULLIGAN: Will you state for the record what you have been advising Mr. Russell on?
>
> MR. WERKSMAN: I have been advising Mr. Russell with respect to answering the questions whether he recollects or doesn't recollect and that is the only advice I have been giving him.
>
> APPEALS OFFICER STREB: All right. Let's proceed.

Ad. Rec. filed November 1977, pp.1238-1240.

The complaints against the Civil Service Commission and its Bureau of Personnel Investigations were never proces-

sed in accordance with 5 C.F.R., Part 713. The Complaints examiner on the CSC remand recited that the proceedings were to be conducted "as nearly as possible" in accordance with Part 713, but the appellant was never advised what rules applied.

The Civil Service Commission's General Counsel advised both the Executive Director of the Civil Service Commission and the Chairman of the Board of Appeals and Review that their position in refusing to process complaints of discrimination against BPI was untenable. App., p. 233a. The Commission did not change its position.

The Report and Recommendations of the Hearing Examiner, adopted in total by the Executive Director CSC stated as follows:

> Whether CSC discrimination against Mr. Brees by failing to accept and process his discrimination complaints against BPI.

Complainant alleges that this failure on the part of the CSC to accept and process his allegations of racial discrimination against BPI, which were not processed until this case was remanded from the District Court, is further evidence of dicscrimination and retaliation.

Evidence in the file in uncontroverted that it has been the historic position of the U.S. Civil Service Commission that someone who was not an employee or applicant for employment at the agency could not file an EEO complaint. Paragraph 1, page 2, IR Exh. 12 assumes it. The 8 May 1974 BAR decision on Mr. Brees' complaint spells it out in detail on page 3 (IR Exh. 23). Even the General Counsel's letter at IR Exh. 24, stating that the argument is not tenable accepts its existence.

Mr. James Scott testified at great length that at no time from 1969 to the present has it been the CSC policy or interpretation of 5CFR Part 713 that a non-employee, non-applicant for employment was eligible to file an EEO complaint under those procedures (TR 4/21/77, pp.

> 221-223; 4/25/77, pp 27-34, 37). Mr. Drummond also stated that his knowledge of regulations would preclude anyone in Mr. Brees' position from filing an EEO complaint directly against BPI under Part 713.
>
> The evidence is clearly that the CSC has uniformly interpreted its regulations that only an applicant for employment could file an EEO complaint with an agency and that the 713 procedure did not allow processing of a complaint directed against BPI, Bureau of Recruiting and Examining or any other component organization. Whether this is a viable or appropriate policy is not within the purview of a review performed by a Complaints Examiner. What was within the scope of his review is whether or not the policy as it existed was uniformly applied. It was.

In implementation of the Prisoner Rehabilitation Act of 1965 and the District Columbia Work Release Act of 1966 The Civil Service Commission had inter-alia established a program under the code name of "Project Start" for bringing

selected inmates and releases of Lorton reformatory into the Federal government on a transitional basis. After a transitional period of employment with the Federal government, it was officially anticipated that these employees would be converted to regular full-time career conditional employees and that the BPI would find them suitable. Successful job performance during the transitional period of work-release, usually 6 months or less, was deemed sufficient evidence of rehabilitation to justify a finding of suitability for employment as a "good risk" former offender. (FPM Chapter 306, Appendix, p. 222a et seq.) As noted below, there were approximately 100 inmates or releases of Lorton in this program.

Despite the refusal of the government to produce the records requested, the CSC hearing examiner did accept a newspaper

report of a minority felon employed by the Departme of Health, Education and Welfare, (Ad Rec.filed October 1977, p. 2614) which in part reads follows:

> Raymond L. (Filter Tip) Harris, Jr. has spent about half of his 32 years in prison. For the past 20 months he has been on parole. He is employed by the Department of Health, Education and Welfare and, for the first time in his life, he says, he has the opportunity to support his wife and five children in decency.
>
> But now, Raymond L. "Filter Tip" Harris, Jr. faces more trouble as a result of an incident arising out of an arrest for something he insists he did not do.
>
> On Wednesday, he was arraigned before U.S. District Judge Aubrey E. Robinson, Jr. on charges of assault with a dangerous weapon to wit a microphone, and destroying government property, to wit, the microphone."* * *

> His rehabilitation, which Harris says has become the focal point of his life, includes the job at HEW.
>
> But the long record, which runs the gamut from stealing automobile license tags to armed robbery, was always there.* * *
>
> * * *
>
> He allegedly threw the microphone in the direction of Margolis smashing the instrument. A microphone used in his manner is regarded as a dangerous weapon. * * *
>
> If he is convicted on either charge according to D. George Gates, Harris's attorney, Harris' parole could possible be revoked. Harris has a total of 27 years of backup time.

This same article (at AR-CSC 2615) describes the "Start Program", as follows:

> Under Start, former convicts are given the opportunity to go to work for the government. For four hours a day, they work at their jobs. For another four hours, they attend school (in Harris' case, it is Federal City College, where he is stud-

> ying business administration). Persons in Start are paid for eight hours of work, and Harris, who is a GS 4, up from GS 3, makes $6,544 a year in HEW's surplus property office.
>
> If he stays in the program three years, Harris can become a GS 9, making $11,000 a year and up.
>
> By his own account, Harris began to head himself towards eligibility for Start, which has about 100 former convicts in it in the Washington area, in 1967, when he got out of prison for 55 days after serving several years on assorted charges, including assaulting a policeman and carrying a pistol without a permit.

Although information on participants in Project Start for the purpose of statistical comparative analysis or other comparison to ascertain whether discriminatory treatment had been accorded to appellant by BPI was requested by the appellant, this information was withheld by the government with the concurrence of the hearing examiners.

The evidence to establish the disparate treatment or impact on Brees compared with the treatment afforded minorities in Project Start and other instances of the employment of former public offenders was peculiarly within the control of the government, and the government refused to release the information. Under the Federal Rules of Evidence the appellant is entitled to the presumption that the evidence withheld would be unfavorable to the government. See Huey v. The Department of Health and Human Services, EEOC No. 0183403 (Feb. 28, 1986) and Colquitt v. Turnage, Req. No. 05870528 (EEOC June 14, 1988). In the instant case, "unfavorable to the government" would mean that the withheld evidence could establish Mr. Brees' charge of discrimination, and entitle him judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

No. 89-860

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

APPENDIX - VOLUME 1 of 3
TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5273 September Term, 1988
C.A. 74-00972

Earl R. Brees,
Appellant

v.

Robert E. Hampton, individually and as Chairman of the U.S. Civil Service Commission et al.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

[Filed August 29, 1989.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5273 September Term, 1988
C.A. 74-00972

Earl R. Brees,
Appellant
v.

Robert E. Hampton, individually and as Chairman of the U.S. Civil Service Commission et al.

BEFORE: Mikva, Buckley and Williams, Circuit Judges

ORDER

Upon consideration of Appellant's petition for rehearing, filed July 28, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

[Filed August 29, 1989.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued: March 13, 1989
Decided: June 13, 1989

No. 88-5273

EARL R. BREES, APPELLANT

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.

On Appeal from the United States District Court for the District of Columbia

(Civil Action Nos. 74-0972, 75-0178)

Tracy E. Mulligan, with whom Glenn H. Carlson was on the brief, for appellant.

Molly D. Current, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, and John D. Bates, and R. Craig Lawrence, Assistant United States Attorneys, were on the brief, for appellees. Daniel Bensing, Assistant United States Attorney, also entered an appearance fo appellees.

Before: MIKVA, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge: This is the appeal of a Title VII action, 42 U.S.C. §2000e-16, brought by the administrator of the estate of the late Earl R. Brees. The defendant-appellees ("defendants") are three U.S. government agencies: the Office of Economic Opportunity ("OEO") (now the Community Services Administration), the Civil Service Commission ("Commission"), and the Department of Commerce ("Department"). The initial complaint also named as defendants the heads of the agencies in their individual capacities, but the district court dismissed these counts, and that portion of the ruling has not been appealed.

Appellant argues that beginning in 1968, Mr. Brees, a white male, was unlawfully discriminated against on the basis of his race and was subjected to reprisals for complaining about that discrimination.

Appellant maintains that defendants unlawfully denied Mr. Brees employment and promotions within the federal civil service, and, as evidence of reprisals, points to alleged violations of federal personnel regulations and to various administrative proceedings that were assertedly conducted in an unfair fashion. The district court, however, granted summary judgment for the defendants because it found that the principal charges in appellant's complaint were precluded by a 1971 settlement agreement voluntarily entered into by Mr. Brees, and that the remainder of appellant's claims had little merit. See Brees v. Hampton, Nos. 74-0972, 75-0178, Memorandum opinion (D.D.C. July 20, 1988) ("Mem. op."). We agree with the district court.

It is discomfiting that this lawsuit, which began in 1974, is only now con-

cluding. While in some cases such a long delay might be justified, in this instance the judicial system suffers the blame. The summary judgment motions should have been decided within a reasonable time frame or the case should have been ordered to trial.

I.

Earl Brees was a disabled veteran honorably discharged from military service in 1960. During the next six years, he obtained a college degree and worked from time to time in both federal civil service jobs and in the private sector. In 1967, Mr. Brees worked for a private travel company, Travel Consultants, Inc., as controller. In early May 1967, he signed five checks drawn on his company's account, totalling over $80,000, all payable to "J.R. Bishop," his wife's maiden name. His company became aware of his action,

and on May 27, 1967, he was arrested for embezzlement. The charge was changed first to forgery, and then later to false pretenses. On September 15, 1967, Mr. Brees pled guilty to the misdemeanor charge of "attempted false pretenses," received a one-year sentence (which was suspended), and was placed on probation for a year.

On June 8, 1967, Mr. Brees was hired by the Interior Department's Bureau of Land Management as an operating accountant, GS-9. He sought transfer to the Accounting Systems Branch, Finance Division, of the OEO. On May 25, 1967 (two days prior to his arrest) he had submitted an employment application to the OEO, question 37 of which asked: "Have you ever been convicted of an offense against the law or forfeited collateral or are you now under charges for any offense against the law?"

Mr. Brees answered "No".

On August 27, 1967, Mr. Brees was transferred from the Interior Department to OEO, where he was employed as a GS-11 accountant. On August 28, he signed an appointment affidavit ("Standard Form 61"), which contained the following question: "Since you filed [an] application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Mr. Brees responded "No". On the same day his fingerprints were taken and a routine National Agency Check and Inquiry was begun.

By all accounts, Mr. Brees performed his job satisfactorily, and on October 22, 1967, he was promoted to a GS-12 position. On March 1, 1968, the Civil Service Commis-

sion notified the OEO Personnel Security Officer that the National Agency Check and Inquiry had revealed Mr. Brees' prior arrest. On March 6, OEO requested that the Commission conduct a full field investigation of Mr. Brees.

By letter of June 27, 1968, OEO notified Mr. Brees that it proposed to remove him from his position because he had falsified his Standard Form 61. On July 19, after receiving his reply, OEO dismissed him, effective August 3. On August 2, 1968, Mr. Brees sent separate letters to President Lyndon B. Johnson and to the complaints officer at the Commission, in which he alleged that he was the victim of racial discrimination, and on the same day he appealed to the Appeals Examining Office of the Civil Service Commission. Mr. Brees contended that had he been black, he would have been granted rehabil-

itated offender status and would not have been terminated.

On January 21, 1969, the Appeals Examining Office set aside Mr. Brees' removal, on the ground that the Standard Form 61 he had signed in August required him to disclose only events that occurred after the date that OEO had received his initial application (which, although dated May 25, was not in fact received by OEO until August). On February 4, Mr. Brees was reinstated to his position at OEO but at the same time received a letter dated January 31 proposing his removal on different grounds (fraud and deception in obtaining federal employment, and criminal conduct). He was dismissed on March 5, effective March 7. Mr. Brees appealed within OEO and was given a hearing before a Hearing Committee in November and December 1969. The Committee unanimously

recommended his reinstatement to a less sensitive position, concluding in its report of March 6, 1970 that OEO's action in discharging him a second time was "not taken in good faith." The Committee found that "[r]ather than reinstat[ing Mr. Brees] and try[ing] to live with the situation, OEO made the decision to terminate him again, come what may," even though Brees was a "superior worker." The Committee concluded:

> We find that the underlying cause for the second discharge was the agency's hostility to Mr. Brees which had built up since the first discharge and which he had exacerbated by his victory at the Civil Service Commission. We find that the agency rationalized its predetermined decision not to reinstate [Mr. Brees] * * *.

On March 31, 1970, however, OEO issued a

final agency decision sustaining the discharge on the ground of criminal conduct.

Mr. Brees again appealed to the Appeals Examining Office, which rescinded OEO's decision and remanded the discharge case to the agency with instructions to process several discrimination complaints that Mr. Brees had filed but that OEO had not yet acted upon. This delay violated regulations requiring that discrimination complaints be processed within 60 days in cases where hearings were not held, and within 90 days where hearings were held, see 5 C.F.R. § 713.218(a) (1969); 5 C.F.R. § 713.220(a) (1970). On January 21, 1971, the Commission's Board of Appeals and Review rejected OEO's appeal from the Appeals Examining Office decision, and on February 11, 1971, OEO began processing Mr. Brees' discrimination complaints. An

equal employment opportunity ("EEO") counselor was appointed in April 1971, and a report completed in June. The EEO counselor stated that he could not determine whether OEO had discriminated against Mr. Brees on the basis of race, because the agency refused to make available the criminal records of black felons so that the treatment they received could be compared with that of Mr. Brees. Nevertheless, the counselor found that "the squence of events point[s] quite strongly to the possibility of discrimination in the form of reprisals against Mr. Brees because he filed a complaint of discrimination." As support for his conclusion, the counselor noted that "[i]t is difficult to understand whe OEO would be unwilling to simply transfer Mr. Brees to a position unrelated to finance." On June 30, 1971, OEO requested the Commission to

furnish an investigator for Mr. Brees' EEO claim against the agency, and on July 21, OEO was notified that an EEO investigator had been obtained from the U.S. Information Agency.

Meanwhile, between May 1968 and February 1969, the Washington Area Examining Office of the Civil Service Commission received several applications for employment from Mr. Brees. As was customary in such cases, the applications were referred to the Commission's Bureau of Personnel Investigation ("BPI") for a determination of the applicant's "suitabililty" for federal employment. On March 5, 1969, BPI issued a show-cause letter to Mr. Brees informing him that he had 15 days to reply to certain information which had surfaced during the investigation of his suitability. BPI listed Mr. Brees' involvement in criminal proceedings; his

departure from Travel Consultants at the time the attempted embezzlement was discovered; and the fact that he had listed on all but one of his applications that the reason he left Travel Consultants was "excessive hours of work." BPI received and considered Mr. Brees' reply. By letter dated March 28, 1969, Stanley N. Taylor, Chief of the Division of Adjudication and Appraisal at BPI, notified Mr. Brees that on the basis of his "dishonest conduct," his applications for federal employment had been rated ineligible.

On April 16, 1969, Mr. Brees appealed the rating to Kimbell Johnson, Director of BPI, who affirmed the decision, stating that "[b]ecause of the evidence and recency of your violation of the trust and confidence in employment, the Commission cannot at this time accept your applications for certification to governmeng

agencies for employment." Mr. Brees further appealed his rating to the Commission's Board of Appeals and Review, again raising the issue of racial discrimination. On June 3, 1969, the Board sustained the finding of the Director.

In July 1971, Mr. Brees and OEO officials began discussing the settlement of his claims against the agency. These negotiations culminated in an agreement dated August 6, in which OEO promised to cancel Mr. Brees' second removal (dated March 7, 1969), and to reinstate him with back pay (some $19,000). Mr. Brees pledged to take annual leave from August 9, 1971, until October 19, 1971, and to take unpaid leave thereafter until September 6, 1972, at which time he would resign (unless he chose to do so earlier). Mr. Brees agreed that this was in settlement of his claims arising out of the

personnel actions taken against him by OEO.

In the summer of 1971, Mr. Brees also became aware of a memorandum drafted by Stanley N. Taylor, Chief of BPI's Division of Adjudication and Appraisal, dated July 7, 1971, and addressed to his supervisor, Kimbell Johnson, Director of BPI. The Taylor memorandum contained allegedly defamatory information that would have damaged Mr. Brees' employment prospects. For example, it said that he had been convicted in United States district court on the charge of false pretenses, while in fact he had pled guilty to attempted false pretenses in D.C. Superior Court. The memorandum went on to characterize Brees' appeals as "perver[sion]" of the civil service appeals process, and commented that "it is absolutely asinine to state that Brees ahd been 'cleared' by anyone."

On October 28, 1971, Mr. Brees attempted to return to work at OEO and was refused. The next day, he attempted to withdraw his resignation, and this request was also denied by the agency. Mr. Brees then appealed to the Commission, alleging that his resignation was involuntary and that he should be allowed to withdraw it. The Commission determined on May 4, 1973 that the resignation was voluntary and that the agency had valid reasons for not granting the withdrawal request. The district court later remanded the case to the Commission for a full hearing on the issue of voluntariness; the Commission affirmed its earlier decision that the resignation was voluntary.

In 1973, Mr. Brees applied for a temporary position as a computer specialist in the Office of Telecommunications at the Department of Commerce. While his

application was being subjected to a pre-appointment check, the Department decided to abolish the position. Appellant charges that the Department acted after receiving false and unfavorable information about Mr. Brees from BPI through improper channels. The Department's Investigations and Inspections Staff conducted an investigation, and a hearing was held on September 18, 19, and 24, 1975. After evaluating all the evidence, the complaints examiner concluded on January 13, 1976 that "the agency's inaction with respect to complainant's applications for various positions was unrelated to complainant's discrimination complaint," and recommended that Mr. Brees' complaint be dismissed. On appeal, the Department's Acting Assistant Secretary for Administration agreed. Later, a different complaints examiner appointed by

the Civil Service Commission found that there was no evidence that any improper release of information by BPI was approved by BPI officials or even known to them.

In late 1973, Mr. Brees submitted additional applications for employment with Commission examining offices in Washington, Oklahoma City, Atlanta, Pittsburgh and St. Louis. The Washington, Atlanta, and Pittsburgh offices submitted requests to BPI for determinations of suitability, triggered by Mr. Brees' previous rating of unsuitability and his 1969 arrest. Between December 6, 1973, and January 4, 1974, and again between February 6 and 7, BPI conducted investigations of Mr. Brees' suitability. As a result thereof, Mr. Brees was invited to attend a meeting in April to offer any comments, explanations, or information he wished BPI to consider. Mr. Brees replied

that on advice of counsel, he preferred to respond via interrogatories rather than in person. By letter dated June 20, 1974, the Commission sent Mr. Brees a statement of information that required his comment, to which he replied on July 1. On June 27, 1974, Mr. Brees filed suit in U.S. district court, and action on the suitability determinations was suspended until the U.S. Attorney later requested that they be completed. In 1975, Mr. Brees received a positive suitability rating.

In December 1973 and January 1974, Mr. Brees filed a series of EEO complaints against BPI and the Commission, alleging racial discrimination and reprisals against him for filing earlier complaints. The Commission initially took the position that 5 C.F.R §713.212(a) (1974) permitted complaints of discrimination to be filed against an agency only by its employees or

applicants for positions within that agency, and did not authorize complaints such as the one Mr. Brees attempted to file directly against BPI. On November 19, 1975, however, the district court remanded the complaints to the Commission and ordered that they be processed. An investigation was conducted from January 5 through January 28, 1976. Efforts at informal resolutions were unsuccessful, and by letter of June 24, 1976, Mr. Brees requested a hearing on his allegations. A prehearing conference was held on January 11, 1977, and the hearing was conducted on April 12, 21, 25-28, June 22, 27-29, and July 6-8, 1977. Mr. Brees was represented by counsel. The complaints examiner concluded that "[t]he evidence presented fails in each instance to show that the actions charged stem from discrimination and/or retaliation for earlier complaints,"

and recommended that a decision issue "that there was no discrimination and/or reprisal against Mr. Brees," On September 8, 1977, the Civil Service Commission announced its final decision in which it adopted the findings and recommendation of the complaints examiner.

The district court proceeding then resumed. After the Commission's decision on remand, Mr. Brees deposed a number of witnesses, and the government successfully moved for a protective order. On January 18, 1978, the district court granted Mr. Brees' oral motion for leave to file a motion for summary judgment by February 20, 1978; Mr. Brees later sought and was granted extensions. During March 1978, Mr. Brees filed twelve motions for summary judgment, see Mem. op. at 2 n.2, and on April 19, defendants submitted their response to Mr. Brees' motions and moved

for summary judgment as well. Over the next several months, the parties sparred over appropriate statements of stipulated material facts. On June 5, 1979, Mr. Brees moved to compel the Commission and OEO to file the complete administrative record; the defendants filed their response on July 11.

The docket sheets list no substantive development in the case until October 5, 1984, when Mr. Brees requested a settlement conference and submitted a supplemental memorandum of points and authorities in support of his pending motions for summary judgment. The court on February 21, 1985, denied Mr. Brees' request to refer the case to a magistrate for settlement proceedings, and directed the parties to produce a complete administrative record. Thereafter, on October 2, 1985, the court issued a memorandum and order

directing Mr. Brees to show cause within 30 days why his complaint should not be dismissed with prejudice. Mr. Brees responded to this order on October 28, and two days later submitted an outline of the administrative record.

In 1987, Mr. Brees applied to this court for a writ of mandamus to order the district court to issue its decision, and on May 1 of that year, this court denied the petition, commenting that "[w]e are confident that the district court will act with all due haste." In re Earl Roland Brees, No. 87-5086 (D.C. Cir. May 1, 1987). On July 2, 1987, counsel notified the district court that Mr. Brees had died. The following year, his estate sought another writ of mandamus, which was rendered moot when, on July 20, 1988, the district court granted summary judgment in favor of the defendants.

The estate of Earl R. Brees appeals.

II.

A.

The issue in this case is whether the district court erred in granting summary judgment to the defendants. The Federal Rules of Civil Procedure preclude summary judgment if "there is [a] genuine issue as to any material fact"; otherwise, "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the defendants have carried their burden of demonstrating the absence of any genuine issues of material fact, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), appellant must come forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). The defendants need not provide evidence specifically negating appellant's claims, see Celotex Corp. v. Catrett, 477 U.S.

317, 323-26 (1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The issue is whether a "fair-minded jury could return a verdict for the [appellant] on the evidence presented." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

Notwithstanding the barrage of charges, investigations, proceedings, reports and reviews, the district court was correct in finally concluding that no genuine issue of material fact existed in this case. As an initial matter, the settlement agreement itself precludes many of Mr. Brees' claims. The agreement provides that it was entered into

> in resolution of the adverse action taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual Chapter 752 and shall in no way be construed to mean that OEO or any other agency has found or may find in favor of Mr. Brees' complaint of discrimination.

Mr. Brees further promised to "irrevocably withdraw[] his complaint of discrimination against the OEO" and "not to file subsequent complaints and appeals resulting from or arising out of the same subject matter as contained in his complaint and appeal or from any decisions heretofore made by the Office of Economic Opportunity concerning Mr. Brees." That agreement bars as a matter of law any action arising out of Mr. Brees' termination from OEO, as well as any subsequent claims resulting from that termination, against OEO or any other agency.

Appellant argues that the settlement agreement is invalid because Mr. Brees was coerced into signing it, and his consent was therefore not "voluntary and knowing," Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). Appellant also contends that the settlement was not "voluntary" within the meaning of applicable regulations because the government set the effective date of Mr. Brees' resignation, and that the settlement was void both for lack of consideration and because the provision in the agreement making his resignation "irrevocable" was illegal. We address these objections in turn.

First, we find that appellant has not established the existence of a genuine issue of material fact with respect to duress or coercion. While Mr. Brees undoubtedly faced financial and other

pressures to enter into the settlement agreement, the circumstances surrounding the settlement suggest that it was voluntary. Mr. Brees himself requested the meeting which led to the commencement of the settlement negotiations, and, according to an affidavit submitted by the defendants, Mr. Brees originated the idea that "if he could be reinstated with back pay he would be willing to resign." The Associate Director of the OEO's Office of Administration swore in an affidavit that "[u]ntil Brees had volunteered to resign in conjunction with his reinstatement, the idea of his resignation had never crossed my mind." The settlement agreement itself recites that "Mr. Brees further acknowledges that he made the initial offer to resign and that his offer and the provisions for resignation contained herein were not secured or obtained by duress or

coercion." Mr. Brees received a draft of the proposed settlement agreement on July 29, and did not sign it until August 6, indicating that he had more than a week to review it.

Nor did the agreement become involuntary within the meaning of 5 C.F.R. §715.202(a) (1971), which provided that an employee "is free to resign at any time [and] to set the effective date of his resignation," because OEO, rather than Mr. Brees, set the effective date of his resignation. Mr. Brees chose "the effective date of his resignation" by voluntarily entering into the settlement agreement, which provided that:

> Mr. Brees hereby resigns from his position in the Office of Economic Opportunity effective September 6, 1972, unless Mr. Brees decides on his own volition to resign on a date prior to September 6, 1972.

Mr. Brees was a knowing and willing participant in the negotiations that culminated in the settlement agreement, and by his assent to the settlement he fixed his own date of resignation within the meaning of the regulation.

Appellant also contends that OEO had legal authority to award Mr. Brees back pay only by virtue of the January 21, 1969, Appeals Examining Office decision ordering his reinstatement, and that his reinstatement with back pay signalled some sort of acceptance by OEO of that decision. The Standard Form 50, Notification of Personnel Action, which cancelled appellant's second removal and reinstated him, cited as authority for the provision of back pay "subchapter IX, 5 U.S. Code." By statute, back pay may be awarded only to an employee "who, on the basis of a timely

appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, [or] regulation * * * to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. §5596(b)(1). Regulations promulgated under this section authorized an agency to grant back pay if it determined that a personnel action was "unjustified" or "unwarranted," 5 C.F.R. §§550.801(b), 550.803(a) (1971). Appellant maintains that only by implicitly recognizing the illegal nature of Mr. Brees' second removal could OEO have derived legal authority to award him back pay. But if OEO had already determined that the second removal was illegal, then it was under a pre-existing legal duty to reinstate Mr. Brees, and there was no consideration for the settlement agreement. Appellant concludes that faced with

this dilemma, defendants must concede either that Mr. Brees' second removal was unlawful and that the settlement agreement was void for lack of consideration, or that OEO had no legal authority to award back pay and that the agreement was void ab initio for that reason. We think no such dilemma exists.

Mr. Brees received valuable consideration for the settlement agreement. When it was reached, no final decision had been made as to the legality of the second removal. The agreement itself expressly states that OEO did not admit that it or any other agency "has found or may find in favor of Mr. Brees' complaint of discrimination." OEO had rejected the Hearing Committee's recommendation that Mr. Brees be reinstated, and he had appealed to the Commission's Appeals Examining Office. The Commission then vacated OEO's decision

to remove him and remanded the case to OEO with instructions to process his discrimination complaints. Whatever the merits of Mr. Brees' claim that his second removal was illegal, he was by no means assured of prevailing; at the very least, his back pay and vacation credits would have been received only after substantial delay.

The second horn of OEO's alleged dilemma is equally frail. We see no basis for appellant's assumption that the civil service regulations required OEO to admit that Mr. Brees' discrimination complaint was valid as a prerequisite to awarding him back pay. Appellant, following the OEO Hearing Committee's report of March 6, 1970, maintains that OEO did not act in good faith in terminating Mr. Brees for a second time so soon after the Appeals Examining Office had ordered him rein-

stated. But this does not mean that Mr. Brees cuold not have been terminated later, on different grounds. By way of illustration, the Appeals Examining Office opinion of January 21, 1969, which had ordered Mr. Brees reinstated after his first removal, cautioned that:

> In issuing this opinion we do not mean to suggset that [Mr. Brees'] conduct in connection with his application for Federal employment is praiseworthy or that he acted with full candor. Nor are we saying that the agency is powerless to seek and effect the appellant's discharge [on] the facts exhibited in this record. All we hold is that the agency has not supported its charge that Mr. Brees falsified Standard Form 61.

Mem. op. at 7. OEO, for example, might have determined that Mr. Brees' second removal was "unwarranted" or "unjustified" because it was not undertaken in good

faith, and yet have retained the ability to discharge Mr. Brees again, on the same or other grounds, if it followed the correct procedures. OEO, in other words, could have conceded that the second removal was procedurally improper, and paid Mr. Brees back pay under the settlement agreement, without extinguishing its right to terminate him later.

Finally, appellant argues that the agreement was void because OEO refused to permit Mr. Brees to withdraw his resignation. The applicable regulation provided that:

> A resignation is binding on an employee once he has submitted it, except that the agency, in its discretion, may permit the employee to withdraw his resignation at any time before it has become effective.

5 C.F.R. §715.202(b) (1971). In 1973 the regulation was amended and another sen-

tence added: "An agency may decline a request to withdraw a resignation before its effective date only when the agency has a valid reason and explains that reason to the employee." The settlement agreement in this case provided that the appellant's resignation was "irrevocable" and "shall not be withdrawn by Mr. Brees," which appellant maintains violated even the 1971 version of the regulation.

Even assuming arguendo that Mr. Brees could not bargain away whatever entitlement he had to withdraw his resignation, the regulation by its terms vested discretion in the agency over the matter, and OEO did not abuse its discretion in this case by refusing Mr. Brees' request to withdraw his resignation. The Commission noted that by means of the settlement, OEO had reinstated Mr. Brees, paid him back salary, and provided him vacation time

credits, all on the assumption that Mr. Brees would resign. Permitting Mr. Brees to withdraw his resignation would have allowed him to renege on his part of the bargain. We defer to the Commission's view that the settlement did not contravene civil service regulations. "An agency's interpretation of its own regulations is entitled to great weight." Tallahasee Branch of the NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cirt. 1989).

B

Appellant urged several additional claims before the district court, all of which were correctly rejected by the summary judgment. The administrative record raised no genuine issue of material fact for trial.

Appellant maintains that the background check of Mr. Brees conducted in 1968 and 1969 was discriminatory. The

record shows, however, that BPI routinely conducted suitability determinations on applicants referred to it by all federal agencies. An EEO complaints examiner who reviewed the case in 1977 concluded that "[t]he 1969 suitability rating was found, on appeal through appropriate Civil Service channels, to have been in full consonance with the regulations governing BPI at the time," and that "neither the initiation of nor the outcome of the 1969 suitabililty determination appeals to have been either discriminatory or regulatory [sic] The EEO complaints examiner also found that "[n]o conclusion of discrimination or disparate treatment can be drawn." All Washington area applications were at that time referred to BPI, and "there was no indication that Mr. Brees received any different treatment * * * from any other applicant."

Washington area applications were at that time referred to BPI, and "there was no indication that Mr. Brees received any different treatment * * * from any other applicant."

Second, appellant claims that BPI discriminated and retaliated against Mr. Brees by unreasonably delaying the completion of his 1973-74 suitability determination. We find, however, that although a delay may have occurred, there was no indication that it was due to discrimination against Mr. Brees. Contributing to the delay were factors for which Mr. Brees must share some responsibility: the congressional inquiries into BPI that he instigated, his decision to file suit in U.S. district court, and his desire to respond in writing to BPI's requests for information, rather than to appear in person as BPI had suggested. While BPI

evidently did not act with dispatch during this entire protracted epic, appellant has introduced no evidence that this delay was discriminatory in nature.

Third, appellant contends that the Commission discriminated against Mr. Brees by initially refusing to process his discrimination claim against BPI in December 1973. This refusal, however, cannot serve as a cause of action, because Mr. Brees has already received a remedy; the district court ordered the Commission and BPI to process his complaints. A hearing was held, and an examiner made extensive findings of fact accepted by both the Commission and district court, see Mem. op. at 15-16. The hearing examiner concluded that Mr. Brees' complaints before the Commission and BPI were meritless, and that he had not established that he had suffered either discrimination or reprisals.

Fourth, appellant maintains that the Commission discriminated against Mr. Brees by failing to provide a full and fair hearing and decision on his discrimination claims. Specifically, appellant alleges that numerous procedural defects occurred in the Commission's investigation and hearing on remand from the district court. The district court found that any such defects were "either nonexistent or inconsequential to the overall fairness of the various proceedings," Mem. op. at 18, and we agree. The procedural complaints were examined in detail by the Commission, and none has merit.

Fifth, appellant argues that BPI and the Commission discriminated against Mr. Brees by interfering with the preparation and prosecution of his discrimination claims. Appellant alleges that the Commission failed to provide Mr. Brees with

uncensored versions of documents during the hearings on remand ordered by the district court. Portions of documents were deleted, for example, on the ground that they were "embarassing to the government's case." An EEO complaints examiner, however, has already rejected appellant's argument, finding that the relevant passages "do not pertain to the issues at hand and there was therefore no impropriety in their deletion." Appellant provides no reason why this conclusion is in error.

In addition, appellant contends that BPI withheld necessary statistical information comparing the treatment of white and black ex-offenders under the Rehabilitated Offender Program. On remand from the district court, an EEO complaints examiner discussed this allegation at length and concluded that compilation of the statistics would be a monumental task that could

be accomplished only through a manual search of three to five million records. As a practical matter, then, the information was unavailable.

Finally, appellant contends that the Commission and BPI discriminated against Mr. Brees by illegally furnishing false derogatory information about him to the Department of Commerce. In 1973, when Mr. Brees applied to the Department, he was allegedly told by Commerce officials that he was qualified for a position there. The position for which he applied was later abolished. Appellant contends that this action was taken on the basis of defamatory information furnished by BPI.

An EEO complaints examiner, however, after an extensive investigation and hearing, found that the elimination of the position was not a product of discrimination against Mr. Brees. Instead, the

examiner found that the references provided by Mr. Brees did not supply evidence favorable to his employment application. As a result, the Commerce Department contacted BPI, and learned that an investigation regarding Mr. Brees' suitability was underway. Consequently, the Department held Mr. Brees' application in abeyance pending receipt of a report from BPI. This is the same 1973 suitabililty determination that we have already found was not delayed because of discrimination or reprisals. In the interim, the position was abolished. The examiner found no evidence of a reprisal; he noted instead that "[t]he alleged inabililty to obtain information concerning [Mr. Brees'] past employment arose prior to [his] filing the discrimination complaint." We find that even if an unauthorized release of information occurred, there is no evidence that

it damaged Mr. Brees in any way. We have no occasion to pass on the defendants' suggestion that they are not liable for the release of information in any event because BPI's policy forbade it and because no BPI official in any position of authority approved the release or was aware of it, see Meritor Savings Bank v. Vinson, 477 U.S. 57, 72-73 (1986).

In sum, appellant has failed to present an issue of material fact regarding Mr. Brees' Title VII claim.

C.

We regret the necessity for commenting on the long period of time during which the parties' respective motions for summary mudgment were pending before the district judge. Summary judgment is intended to shorten proceedings, not draw them out. See Celotex Corp. v Catrett, 477 U.S. 317, 327 (1986); 10 C. Wright and

A. Miller, Federal Practice and Procedure § 2712, at 563 (2d ed. 1983). It is no accident that the first Federal Rule of Civil Procedure proclaims that the purpose of the Rules is "to secure the just, speedy and inexpensive determination of every action."

As civil caseloads continue to increase, see Marvell, Caseload Growth -- Past and Future Trends, 71 Judicature 151, 153 (1987), the court system must be ever more sensitive to avoidable litigation delays. A strictly enforced litigation calendar is indispensable in controlling such delays, see Mahoney & Sipes, Zeroing In On Court Delay: The Powerful Tools of Time Standards and Management Information, 1985 Ct. Mgmt. J. 8, 11-12. If reasons exist why a district court cannot pass on a motion for summary judgment within a reasonable preiod of time, then it must

move forward to the next stage of the calendar and schedule the case for trial. See Levitt, A Simple Solution to Judicial Gridlock, 27 Judges' J. 32, 33 (Summer 1988) (Michigan 30-month track from filing to disposition for civil cases); Moran, Stating the Case for Timely Justice, 8 State Ct. K. 23, 25 (Fall 1984) (18-month proposal by Conference of State Court Administrators). Such a system of automatic, self-operating deadlines is reflected in the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, which regulates the pace of criminal proceedings. While the philosophy of the Speedy Trial Act is of course inappropriate in the civil context, the Act reminds all of us that either we keep our own dockets in a timely fashion, or Congress can provide some strong antidotes to justice delayed.

* * *

For the reasons stated, the judgment of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1470 September Term, 1987

In Re: Linda Cramer, Special Administrator of the Estate of Earl Roland Brees,

Petitioner

BEFORE: Robinson, Silberman and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for writ of mandamus be dismissed as moot. On July 20, 1988, the district court granted summary judgment in favor of the defendants and denied plaintiff's several motions for partial summary judgment.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

[Filed August 12, 1989.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARL R. BREES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. Nos. 74-0972
	:	75-0178
ROBERT E. HAMPTON, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

In these consolidated actions plaintiff sues three government agencies. Civil Action No. 74-0972 names the Office of Economic Opportunity ("OEO", presently the Community Services Administration) and the Civil Service Commission ("CSC"). The Department of Commerce is the defendant in Civil Action No. 75-0178.[1] The cases were

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[1]The heads of the agencies in their official capacities are the only proper defendants in Title VII actions, thus the cases against the named defendants in their individual capacities are dismissed.

consolidated because they allege a continuing course of conduct by defendants against the plaintiff involving alleged discriminatory treatment based upon his race and acts of reprisal against him for having lodged administrative complaints against such treatment.

The matter is before the court on twelve separate motions for partial summary judgment by plaintiff; motion of Alvin J. Arnett and Bert A. Gallegos (defendants) to dismiss or, in the alternative, for summary judgment; motion of Frederick B. Dent (defendant) to dismiss or, in the alternative, for summary judgment; plaintiff's opposition to motion of Hampton and Drummond to dismiss or, in the alternative, for summary judgment; and defendants' reply thereto. Plaintiff's many motions for "partial summary judgment" oftentimes seem to crisscross and

overlap and are couched in a sort of drumbeat of repetitive general allegations of conspiratorial conduct on the part of the defendants.[2] Although this tactic

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[2]The motions allege in seriatim:

(a) OEO illegally discriminated against him on the basis of either his sex or race and coerced or took reprisals against him for filing complaints of discrimination by refusing to accept, reject, or process his complaints of discrimination and by appealing the final decision (January 21, 1971) of the Board of Appeals and Review.

(b) OEO took reprisals against him for filing complaints of discrimination by refusing to comply in good faith with the Civil Service Commission's January 21, 1969 Order of Reinstatement and by signing a Letter of Proposed Removal four days before the technical reinstatement became effective.

(c) OEO and the Civil Service Commission Bureau of Personnel Investigations illegally denied plaintiff employment, promotion, and placement on Civil Service Registers by falsely certifying and knowingly submitting to said Bureau an unsigned request for a full field security investigation, by using the results of the illegally initiated investigation as the

(continued)

makes for some confusion, cumulatively these motions reflect plaintiff's basic

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(footnote 2 continued)

basis for plaintiff's attempted discharges and suspension, and by illegally maintaining plaintiff within the "ineligible" status on the Civil Service Register in violation of the 30 day notice requirement of the Veterans Preference Act.

(d) OEO took reprisals against him for filing complaints of discrimination by improperly delegating authority to make the appellate decision.

(e) The Bureau of Personnel Investigations took reprisals against him by delaying the completion of the October 1973 suitability investigation until February 1975, and by refusing until February 1975 to apply in a uniform fashion the Civil Service standards for employment of rehabilitated offenders.

(f) The Civil Service Commission illegally discriminated against him by refusing to accept or process his complaints of discrimination against the Bureau of Personnel Investigations, the Office of Commissioners, and the Office of Executive Director, the Office of General Counsel and the Bureau of Recruiting and Examining.

(continued)

contentions that the defendants separately and/or jointly discriminated against him

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(footnote 2 continued)

(g) The Civil Service Commission took reprisals against him for filing his complaint of discrimination pursuant to this court's Order of Remand, November 18, 1975 by having its General Counsel's Office instruct its Bureau of Personnel Investigations not to answer plaintiff's questions, which were designed to aid his preparation for the administrative hearings to be held pursuant to said Order of Remand.

(h) The resignation of plaintiff from OEO on August 6, 1971 was involuntary and therefore voidable at the option of plaintiff.

(i) The Civil Service Commission, the Office of Executive Director, the Office of General Counsel, the Appeals Examining Office and the Board of Appeals and Review in conjunction with OEO discriminated against him and took reprisals against him by failing to provide fair and mipartial hearings and decisions, by rendering arbitrary and capricious decisions on his appeals, by refusing to uniformly apply the standards for employment of the rehabilitated offender, and by illegally interfering with his preparation of this litigation.

(continued)

on the basis of his race and subjected him to reprisals for complaining against that alleged discrimination by denying him employment and promotion within the civil service, all in violation of Title VII of

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(footnote 2 continued)

(j) The Bureau of Personnel Investigations discriminated and took reprisals against him for filing complaints of discrimination against one of its employees, one W. N. Gillum, by refusing to apply in good faith the January 21, 1969 decision of the Commission that OEO failed to sustain its charges of falsifying an appointment document, by abusing its discretion in applying its rehabilitated offender program standards, and by interfering with the processing of his complaints of discrimination.

(k) The Civil Service Commission denied him a fair and impartial investigation on the issue of discrimination and further that the decision rendered on this issue by the Executive Director, Civil Service Commission, was not supported by the evidence.

(l) The August 6, 1971 agreement between plaintiff and OEO, involving complaints of discrimination, is voidable at the option of plaintiff.

the Civil Rights Act of 1964, 42 U.S.C. § 2000. Plaintiff claims generally that his unfair treatment is reflected by the violation of numerous departmental regulations, and ultimately in the various administrative hearings which he alleges were conducted in an unfair manner.

BACKGROUND

The relationship between plaintiff and the various defendants out of which this controversy arises is set out as follows:

Plaintiff and OEO

Plaintiff was a disabled veteran who was honorably discharged from the military service in 1960.[3] During the following six years while getting a college degree, he worked from time to time in both federal civil service jobs and the private sector. At the end of 1966, plaintiff

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[3]Earl R. Brees is deceased. This suit is being maintained by the adminstrator of Mr. Brees' estate.

sector. At the end of 1966, plaintiff left federal employment and on February 7, 1967, he was employed by a private concern, Travel Consultants Inc. ("TCI") in the District of Columbia. His position was controller, and his duties included the payment of the company's bills, deposit of its income and maintenance of its financial records. In early May 1967, plaintiff signed five checks drawn on TCI's escrow account, totalling over $80,000, all payable to J.R. Bishop, and deposited them into his wife's checking account in an Arlington, Virginia bank. Plaintiff's wife's maiden name was Joy R. Bishop. Officials of TCI became aware of plaintiff's acts shortly thereafter, and on the basis of their complaint, Metropolitan Police officers arrested plaintiff on May 27, 1967 on charges of embezzlement. Subsequently the charge was changed for

forgery, and still later on July 14, 1967, it was further broken down to false pretenses. On September 15, 1967 plaintiff pled guilty to the misdemeanor charge of "attempted false pretenses". Imposition of sentence was suspended, and plaintiff was placed on probation for one year.

Meanwhile, following his May 27, 1967 arrest, on June 8, 1967 plaintiff went back to work for the federal government by reinstatement to a job in the Interior Department's Bureau of Land Management as an operating accountant, GS-9. On or about August 8, 1967, the Accounting Systems Branch, Finance Division of the Office of Economic Opportunity received a co0py of plaintiff's application for federal employment (Form 57). The application was dated May 25, 1967. Question 37 on the form reads: "Have you ever been convicted of an offense against the law or

forfeited collateral or are you now under charges for any offense against the law?" Plaintiff answered this question "No."

As a result of this application, plaintiff was transferred on August 27, 1967, from his Interior Department job to the Acciounting Systems Branch of the Finance Division, OEO, where he was employed as an Accountant, GS-11. On the next day, August 28, 1967, he signed an appointment affidavit containing the following question: "Since you filed application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Plaintiff answered, "No". On the same day the processing required plaintiff to be fingerprinted, and these prints were used to initiate a routine "National Agency Check."

fingerprinted, and these prints were used to initiate a routine "National Agency Check."

From the day he began working at OEO until June 27, 1968, plaintiff performed satisfactorily in his job, and on October 22, 1967, he was promoted to a GS-12 on October 22, 1967. Meanwhile, in early March 1968 the Civil Service Commission notified OEO's Personnel Security Officer that the National Agency Check of plaintiff's fingerprints through the Federal Bureau of Investigation revealed the arrest on May 27, 1967 on the charge of "embezzlement", with no disposition of the charge indicated. Thereupon, OEO requested CSC to conduct a full field investigation in order to ascertain the facts. The resultant report supplied the factual background of plaintiff's involvement with the criminal charges.

In a June 27, 1968 letter OEO notified plaintiff that it proposed to remove him from his position, charging "falsifying an appointment document for Federal employment, to conceal an arrest and charge pending before the District of Columbia Court of General Sessions." After receiving plaintiff's reply, OEO on July 19, 1968 issued a decision dismissing the plaintiff effective August 3, 1968. On August 2, 1968 in separate letters to President Lyndon B. Johnson and the the "Complaints Office" of the CSC, plaintiff complained of racial discrimination and requested to be ealt with as a rehabilitated offender, and on the same day he appealed to the Appeals Examiner's Office of the CSC.

On January 21, 1969, the Appeals Examiner's Office ordered OEO to restore

plaintiff to duty. The Hearing Examiner's opinion which formed the basis of this action noted that:

> In issuing this decision we do not mean to suggest that the appellant's conduct in connection with his application for Federal employment is praiseworthy or that he acted with full candor. Nor are we saying that the agency is pwoerless to seek and effect the appellant's discharge as the facts exhibited in this record. All we hold is that the agency has not supported its charge that Mr. Brees falsified Standard Form 61. [Administrative Record ("A.R.") at 671.]

On February 4, 1969, plaintiff was reinstated but at the same time received a second letter of proposed removal dated January 31, 1969. On March 5th, OEO dismissed his effective March 7, 1969, based on charges of (a) fraud and deception in obtaining Federal employment in concealing an arrest charge, and (b)

criminal conduct in that he entered a plea of guilty to a criminal charge on September 15, 1967. Plaintiff appealed to the agency and pursuant thereto had a hearing before a three-man OEO committee during November and December 1969. The committee was critical of the agency for dismissing plaintiff on essentially the same grounds alleged in its first effort to fire him and recommended plaintiff's reinstatement. Nevertheless, on March 31, 1970, a final agency decision sustained plaintiff's discharge based on the charge of criminal conduct. In his appeal to CSC's Appeals and Examining Office, plaintiff contended that OEO had refused to process his complaint that racial discrimination was a factor in his discharge and that the agency had issued its decision without resolving the racial discrimination issue. Plaintiff's claim of racial discrimination

was based on his allegation that the agency hired blacks who had more serious criminal records that his, and that if he were not white he would not have been fired. Shortly thereafter the Appeals and Examining Office rescinded OEO's decision and remanded the discharge case to OEO for the purpose of processing plaintiff's discrimination complaint. The Commission's Board of Appeals and Review rejected OEO's appeal from this decision on January 21, 1971, and on February 11, 1971 the agency began processing the discrimination complaint. This process apparently involves the selection of an agency counselor by the employee who would make an informal investigation of his complaint with a view toward resolving it at the agency level. Between February 11, 1971 and June 30, 1971, plaintiff's claims remained unresolved and on June 30, OEO

requested the CSC to furnish an investigator for plaintiff's EEO complaint against the agency.

Meanwhile, a meeting was held on July 22, 1971 between plaintiff and OEO's Director of Personnel, its Assistant General Counsel, and a newly-appointed Associate Director of Administration. At this time plaintiff requested reinstatement. Ernest Russell, the new Associate Director, indicated that he had made a thorough review of the file and was of the opinion that the agency had a good case to support plaintiff's discharge but in the bset interests of all concerned the Commission ought to review the file and make a decision. He further stated that OEO would continue to process the discrimination complaint. Plaintiff claims that because he feld mistreated by OEO and was financially pressed, he was looking for a

job. Plaintiff did not wish a discharge reflected on his record and proposed that if OEO reinstated him he would resign at a specified date. Plaintiff also suggested at the time certain retirement and leave without pay benefits.

Pursuant to the discissuion at the meeting a draft settlement agreement and appropriate personnoel documents were drawn by Edward Senseny, Chief of Personnel Operations. These were based primarily on notes taken at the meeting by the Director of Personnel. Between July 23 and July 29, 1971, Senseny had contact with the plaintiff relative to the proposed agreement. After review by the Office of Administration and the General Counsel of OEO, the draft was delivered to plaintiff on or before July 29, 1971. On August 6, 1971 the parties signed a final draft which provided tht the March 7, 1969

removal was to be cancelled; plaintiff was to be reinstated to the position of Systems Accountant, GS-510-12 as of August 6, 1971; he was to get all back pay due from March 7, 1969, and all pay adjustments; he was to be credited with all annual leave he would have earned and the agency would allow him to take annual leave from August 9, 1971 until October 19, 1971; he would take leave without pay from the latter date until September 6, 1972, at which time he would resign from his position unless he decided to resign earlier; the design to resign, which was to be irrevocable, constituted a material inducement to the agency to reinstate plaintiff; plaintiff acknowledged that he made the original offer to resign and that neither the offer nor the agreement was obtained by duress or coercion of the agency or any of its employees; plaintiff agreed to

withdraw his appeals under parts 713 and 752-B of the Civil Service regulations and not to file subsequent complaints arising from the same subject matter; plaintiff agreed that the agreement was in resolution of the adverse action and was not to be construed as a finding in favor of plaintiff's claim of discrimination; and, plaintiff would not disclose the terms of the agreement without the agreement of the agency.[4]

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[4]The entire document reads:

AGREEMENT CONCERNING THE
REINSTATEMENT OF MR. EARL BREES
TO THE POSITION OF SYSTEM ACCOUNTANT
GS-510-12

This agreement is entered into August 6, 1971, between the Office of Economic Opportunity, represented by the Acting Associate Director of Administration, Mr. Ernest Russell and Mr. Earl Brees.

(continued)

After the signing of the agreement, plaintiff was paid for the period stated

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(footnote 4 continued)

1. By this agreement the Office of Economic Opportunity agrees to reinstate Mr. Earl Brees to the position of System Accountant, GS-510-12, Step 5, on August 9, 1971.

2. The Office of Economic Opportunity further agrees to restore to Mr. Brees all back pay to which he is legally entitled from the time of removal, Marqch 7, 1969, until the date of reinstatement of August 9, 1971, including all pay adjustments for regular periodic step increases. Effective October 17, 1971, Mr. Brees' pay status will be changed from step 5 to step 6 of GS-12.

3. To the extent creditable pursuant to applicable laws and regulations, all annual leave which Mr. Brees would have earned during the period of removal will also be restored to him. Mr. Brees hereby requests and the Office of Economic Opportunity hereby grants annual leave to Mr. Brees effective August 9, 1971, and continuing until close of business October 19, 1971. Upon the use of all of his accrued annual leave, Mr. Brees hereby agrees to assume a leave without pay status which shall continue until September 6, 1972, unless terminated earlier pursuant to paragraph 4, below.

(continued)

therein and bagan the use of annual leave.

On October 28, 1971, he attempted to

(footnote 4 continued)

4. Mr. Brees hereby resigns from his position in the Office of Economic Opportunity effective Septe,ber 6, 1972, unless Mr. Brees decides on his own volition to resign on a date prior to September 6, 1972. Mr. Brees hereby agrees that his decision to resign as set forth hererin constitutes an irrevocable decision which shall not be withdrawn by him nor shall the irrevocable nature of his resignation be affec ed in any way by subsequent changes in applicable fedearl law or regulations. Mr. Brees acknowledges and understands that his resignation constitutes a material inducement to the Office of Economic Opportunity to reinstate him. Mr. Brees further acknowledges that he made the initial offer to resign and that his offer and the provisions for resignation contained herein were not secured or obtained by duress or coercion by the Office of Economic Opportunity or any of its employees.

5. At the time of the signing of this agreement, Mr. Brees will post a letter signed by him to the United States Civil Service Commission with a copy to the Office of Economic Opportunity which irrevocably withdraws his complaint of discrimination against the Office of

(continued)

return to duty with the agency but was refused and on October 29, 1971, he

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(footnote 4 continued)

Economic Opportunity filed under Part 713 of the FPM and his appeal of his removal filed under Prat 752 of the FMP. Mr. Brees understands and acknowledges that withdrawal of such complaint and appeal is in consideratoin of the terms of this agreement and includes an agreement not to file subsequent complaints and appeals resulting from or arising out of the same subject matter as contained in his complaint and appeal or from any decisions heretofore made by the Office of Economic Opportunity concerning Mr. Brees.

6. Mr. Brees affirms that this agreement is in resolution of the adverse actoin taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual Chapter 752 and shall in no way be construed to mean that OEO or any other agency has found or may find in favor of Mr. Brees' complaint of discrimination.

7. Mr. Brees agrees that he shall not publicly release or disclose this agreement or any part thereof without the written consent of the undersigned representative of the Office of Economic Opportunity.

A.R. at 2816 - 18.

attemtped to withdraw his resignation. This request was denied by the agency. Accordingly, plaintiff remained in a leave without pay status from November 15, 1971 until September 6, 1972, at which time his separation by resignation was effected.

Following the date of his separation, plaintiff submitted an appeal to the Civil Service Commission in which he alleged that his resignation was involuntary and that the agency should have allowed him to withdraw it. The final determination of the Commission, issued on May 4, 1973, was that the resignation was voluntary and that the agency had valid reasons for not granting the request for its withdrawal. This court remanded the case to the CSC for the purpose of conducting a hearing on the issue of voluntariness of the resignation. The issue was resolved adversely to plaintiff at the agency level.

Plaintiff and CSC (BPI)

From time to time the CSC issues announcements that it wishes to fill certain specified positions. Persons who wish to be considered for these positions submit standard applications which indicate that they wish to be placed on the egister for consideration._ CSC area examining offices review these applications and rate then on the basis of knowledge and qualifications which indicate the ability to perform the job sought. These examining offices do not determine whether an applicant is otherwise suitable for Federal employmentg. When a question of suitability arises, the examining office refers the applications to the Commission's Bureau of Personnel Invesigation ("BPI") for an assessment. A referral for this purpose is called a "request of suitability for Federal employment."

Routinely area examining offices refer applications to BPI for such determination if the application indicates prior criminal conduct or previous rating of unsuitabililty.

Between May 1968 and February 1969, the Washington area examining office referred several applications for employment made by the plaintiff in response to certain announcements of available positions. Included among these applications was that of May 25, 1967. On March 5, 1969 BPI directed a show-cause letter to plaintiff which advised that he had 15 days within which to reply to certain derogatory data which had surfaced in the course of the investigation of his suitability. In addition to setting out plaintiff's involvement in the criminal proceedings, the letter pointed out that although his separation from employment

with TCI was concurrent with the discovery of the attempted embezzlement; on all but the one of May 25, 1967, plaintiff had listed as his reason for leaving that employment was "excessive hours of work."

Following the receipt of plaintiff's reply, BPI determined that because of "dishonest conduct," his applications which had been referred to it wouold be rated ineligible for the positions sought. The unsuitability ratings were for the specified registers only and had no relationship to Brees' current employment at the time with OEO. The unsuitability ratings were appealed through the appellate levels of the CSC where they were affirmed.

In late 1973, plaintiff submitted several applications for employment pursuant to three separate announcements of positions which were then open. Plain-

latest applications to BPI, plaintiff filed a succession of EEO complaints against BPI and the CSC in December 1973 and January 1974, alleging racial discrimination and reprisals against him in the processing of all his applications and in his nonselection for employment. On January 28, 1974, plaintiff filed a discrimination complaint against BPI and others in the CSC for failure to process his earlier complaints, for conspiring with OEO, for refusal to place him on CSC registers, for referral for a new investigation, for dissemination of false and derogatory information about him, for conspiracy with security people, HEW and the Department of Commerce to keep him from being hired and for miscellaneous reprisals by the Commission.

During the course of the pretrial proceedings in this case these broad

allegations against BPI were remanded to the Commission for the purpose of processing plaintiff's EEO allegations. An investigation was conducted from January 15 through 28, 1976. Informal resolution was not accomplished and plaintiff requested a hearing on all of his allegations. The requested hearing was held and at the conclusion thereof the hearing examiner submitted to the Commission extensive findings of fact. Based upon these facts, the hearing examiner recommended that the Commission determine that plaintiff had not been victimized by either discrimination of reprisal. The Commission adopted the findings and recommendation of the examiner and issued a decision that there had been neither discrimination or reprisal against plaintiff.

allegations against BPI were remanded to the Commission for the purpose of processing plaintiff's EEO allegations. An investigation was conducted from January 15 through 28, 1976. Informal resolution was not accomplished and plaintiff requested a hearing on all of his allegations. The requested hearing was held and at the conclusion thereof the hearing examiner submitted to the Commission extensive findings of fact. Based upon these facts, the hearing examiner recommended that the Commission determine that plaintiff had not been victimized by either discrimination of reprisal. The Commission adopted the findings and recommendation of the examiner and issued a decision that there had been neither discrimination or reprisal against plaintiff.

Plaintiff and Commerce

Plaintiff applied for a temporary appointment as a computer specialist in the Office of Telecommunications of the Department of Commerce. Pending a protracted pre-appointment check of plaintiff, a decision was made to abolish the position. Plaintiff alleges that the Department of Commerce on its own and in concert with BPI unlawfully denied him employment in the agency and by doing so they discriminated against him and subjected him to reprisal. A hearing as had on these charges and the issues were resolved against plaintiff at the agency level.

DISCUSSION

The various proceedings before the agencies have generated an extensive administrative record of over 7,000 pages, including over 6,000 pages of hearing

transcripts. Plaintiff contends that this record reflects that (1) the adverse decisions against him are not supported by credible substantial evidence; (2) he was victimized by procedural errors and violations which violated his rights under varoius acts, regulations, and the Constitution; and (3) the hearings were ot fair and impartial and the decisions were arbitrary and capricious. Thus he seeks an order setting aside the adverse determinations and certain injunctive relief making him whole for his alleged injuries.

Defendants claim that the record evidence more than supports the various decisions, that there were no procedural errors which prejudiced the plaintiff, and that the record affirmatively demonstrates that plaintiff received fair hearings. They urge that the agency actions be upheld.

Plaintiff's contentions obviously impose a dual task upon the court. Insofar as the claim that the agency decisions are not supported by substantial record evidence is concerned, the court understands its function, i.e., to examine the record for the presence of substantial evidence that supports the agency determinations. At the same time it appears that the court is faced with the task of making a de novo determination as to whether or not the proceedings which resulted in adverse determinations for plaintiff were in fact conducted in a fashion which respected his right to due process and ultimate fairness.

With this approach in mind, the court has considered the entire administrative record in the light of the submissions of the parties, and it appears that the record supports the contentions of the

defendants rather than those of the plaintiff.

The adverse decisions of the administrative agencies are clearly predicated upon substantial direct and circumstantial evidence in the record. The evidence supporting plaintiff's claims consists mainly of his uncorroborated testimony which was, for the most part, strongly contradicted by the testimony of other witnesses and some of the documentary evidence.

As to the complaint of alleged procedural errors cited by plaintiff, the court finds that they are either nonexistent or inconsequential to the overall fairness of the various proceedings. Although all of plaintiff's claims in this regard have been considered and are rejected, only one merits discussion.

Plaintiff asserts that he was deprived of witnesses critical to his case. Rather than bearing him out, the record affirmatively indicates that this did not occur. For example, in preparation for the hearing on the issue of discrimination and reprisal by the CSC which was held in mid-1977, the examiner sought from counsel for both sides statements of proposed issues, and lists of witnesses with offers of proof for each witness. Plaintiff never responded satisfactorily to this request, but continued to request witnesses, even during the hearing, and made no specific proffer as to their testimony. The examiners disallowed witnesses for whom no proffer or admissible relevant testimony was made; and some were disallowed because the proffers as to them revealed that their testimony would be cumulative.

As to plaintiff's claim that the hearings were unfairly conducted, the record thoroughly contradicts him. The hearings were protracted and sometimes tedious. One of the hearings was conducted on eight days over a period of three months and another one was a 13-day proceeding over a period of three months. The hearing on the matter involving the Department of Commerce was a three-day proceeding. Naturally during the course of the hearings the examiners were called upon to make on-the-spot determinations, and upon being subjected to the unerring gaze of hindsight some of these rulings may not appear to have been 100% correct; but to the extent that they were not so perfect, none of them -- singularly or cumulatively -- rose to the level of tainting the fundamental fairness of the proceedings.

And finally, the record definitely reflects, rather than bias and prejudice in the conduct of the hearings, a tendency to indulge plaintiff, and uncommon patience on the part of the examiners.

CONCLUSION

Upon consideration of the foregoing, it is ordered that summary judgment be granted in favor of the defendants.

The plaintiff's motions are denied.

WILLIAM B. BRYANT
SENIOR UNITED STATES
DISTRICT JUDGE

Date: July 20, 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5086 September Term, 1986

C.A. No. 74-00972

In Re: Earl Roland Brees,

Petitioner

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, it is

ORDERED by the court that the petition be denied without prejudice. See Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974). We are confident that the district court will act with all due haste in regard to Case Nos. 74-792 and 75-178.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

[Filed May, 1, 1987.]

No. 89-~~860~~ ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

APPENDIX - VOLUME 2 of 3
TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRACY E. MULLIGAN, Esquire
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Petitioner

Of Counsel:

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November 27, 1989

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Earl R. Brees,
10103 Towhee Avenue
Adelphi, MD 20783,

Plaintiff,

v. C.A. #75-0178

ROBERT E. HAMPTON,
individually and
as Chairman of the
United States Civil
Service Commission,
Room 5H09,
1900 E Street, NW
Washington, D.C.
20415,

and Complaint

FREDERICK B. DENT,
individually and as
Secretary of
Commerce,
Room 5854,
14th Street Between
Constitution Avenue
and E. Street, N.W.
Washington, D.C.
20230,

and

BERT A. GALLEGOS, *
individually and as *
Director of the *
Community Services *
Administration *
(formerly the *
Office of Economic *
Opportunity), *
Room 548, *
1200 - 19th St, NW, *
Washington, D.C. *
20506, *
*
Defendants. *

COMPLAINT

Plaintiff, Earl R. Brees, by his attorney, Tracy E. Mulligan, complaining of the defendants, alleges:

1. Jurisdiction. This action arises under Section 717(c) of the Civil Rights Act of 1964, as amended on March 24, 1972, and under the Fourteenth Amendment to the Constitution of the United States.

2. Parties.

a. The Plaintiff is a United States citizen; an honorably discharged disabled

and combat veteran with more than eleven years and nine months of active military service in the Armed Forces of the United States; a former Civil Service employee at the time these actions were taken against him with more than eight years and four months of Civil Service employment who was entitled to reinstatement rights as a disabled veteran with "CAREER" status attained effective in June 1970; and is entitled to Veterans' Preference for employment in the Civil Service of the United States.

b. The Defendants are:

(1) Robert E. Hampton, individually and as Chairman of the United States Civil Service Commission;

(2) Frederick B. Dent, individually and as Secretary of Commerce;

(3) Bert A. Gallegos, individually and as Director of the Community Service

Administration (formerly the Office of Economic Opportunity).

All of the Defendants are officials in agencies of the Executive Branch of the United States Government and are subject to the laws of the United States and to the provisions of the Code of Federal Regulations (CFR).

3. Section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, authorizes an employee or an applicant to file a civil action in an appropriate United States District Court after one hundred eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

a. The Plaintiff filed complaints of racial discrimination, complaints of reprisals, and complaints of violation of the Plaintiff's Veterans' Preference rights against the Department of Commerce

on February 25, 1974.

b. No final decision has been received from the Department of Commerce concerning the Plaintiff's complaints of February 25, 1974, as of February 3, 1975 -- a period of more than 330 calendar days since the complaints were filed.

c. On March 30, 1974, the Plaintiff filed complaints of reprisals taken by the Department of Commerce against the Plaintiff because the Plaintiff filed complaints of racial discrimination against the Department of Commerce.

d. No final decision has been received from the Department of Commerce concerning the Plaintiff's complaints of March 30, 1974, as of February 3, 1975 -- a period of more than 300 calendar days since the complaints were filed.

e. Under the provisions of 5 CFR 713.213, the Plaintiff filed a request for

"precomplaint processing" for complaints of racial discrimination and complaints of reprisals against the Office of Economic Opportunity (now Community Services Administration) on January 5, 1974, and January 11, 1974. This was a prerequisite to filing a formal complaint of racial discrimination under 5 CFR PART 713.

f. No action has been taken by the Office of Economic Opportunity (now Community Services Administration) although more than 380 calendar days have elapsed since the filing of this request.

4. The Department of Commerce did not provide equal opportunity for employment to the Plaintiff and did not promote the full realization of equal employment opportunity by applying standards for the Plaintiff a Caucasian misdemeanant, other than those used to judge the suitability of convicted Negro felons and misdemeanants.

a. The Plaintiff was selected in October 1973 as the best-qualified applicant for a position as a Consultant; as a Computer Specialist, GS-0334-14; or as a Computer Specialist, GS-0334-13, Sept. 6, $24,122 per annum, in the Department of Commerce. Employment was denied.

b. The Plaintiff was described by an Assistant Employment Officer, GS-13, in the Department of Commerce as "probably the most qualified of any applicants for the jobs" (secretary, etc., GS-05 through GS-07). Employment was denied.

c. The Department of Commerce denied the Plaintiff employment although the Plaintiff was not debarred at that time and has never been debarred from the Federal Service; was entitled to Veterans' Preference; was entitled to "reinstatement" as a disabled veteran and as a former Government employee with "CAREER" status;

had current eligibility on a Civil Service Register (Announcement 408); and, in the hiring process, had been duly selected for employment within the Department of Commerce.

d. The Plaintiff's record of rehabilitation since his conviction of a misdemeanor in the District of Columbia Court of General Sessions in 1967, measured against the criteria indicating rehabilitation established in Chapter 306 of the Federal Personnel Manual which implements the Employment of the Rehabilitated Offender in the Federal Service Program, has been characterized by EEO Counselor Wilmer S. Hunt in his June 11, 1971, report to the Office of Economic Opportunity as "evidence of rehabilitation which, in anybody's book, is impressive".

e. The Plaintiff was an employee of the Office of Economic Opportunity from

August 1967 until September 1972; his work at the Office of Economic Opportunity has been characterized by his immediate supervisor as outstanding. All grade promotions were denied him from 1968 to 1972.

f. Subsequent to his misdemeanor conviction in 1967, the Plaintiff earned the degree of Master of Arts in Public Administration: Technology of Management (Computer Systems and Management Information Systems) during the period September 1967 through August 1970 at The American University.

g. Subsequent to his misdemeanor conviction in 1967, the Plaintiff has completed doctoral work, he is currently a Doctoral Fellow, and he expects to receive the degree of Doctor of Philosophy in Education in July 1975.

h. The Department of Commerce has employed convicted Negro felons at grades

at lesta as high as GS-13.

5. The Director of Personnel, Office of the Secretary, Department of Commerce, has endorsed the position that

"We don't have to hire anyone we don't want to hire."

This position clearly is in conflict with regulations established to ensure equal employment opportunity and has been applied to deny the Plaintiff equal employment opportunity.

6. On July 29, 1974, under the provisions of 5 CFR 713.216, the Department of Commerce appointed an EEO Investigator (713.216 Investigator) to investigate the Plaintiff's complaints of racial discrimination which were filed on February 25, 1974. The 713.216 Investigator was denied access to the Plaintiff's file which ws held in the Office of Investigations and Security, Office of the Secretary, Depart-

ment of Commerce. The 713.216 Investigator, therefore, could not compare the Plaintiff's record and utilization and the records and utilization of other Caucasians with those of persons outside the Complainant's (Plaintiff's) group. The 713.216 Investigator was thereby prevented from complying the 5 CFR 713.216 in conducting the investigation.

7. The Office of Economic Opportunity has represented to the Civil Service Commission that the Plaintiff's "resignation" from said agency, effective September 6, 1972, was voluntary and ws not an adverse action; yet, the Office of Economic Opportunity has represented to the Department of Commerce that:

a. The Plaintiff was fired by the Office of Economic Opportunity for maiking false statements on an employment application;

b. The Office of Economic Opportunity saw fit to either terminate or get his (the Plaintiff's) resignation under circumstances which were at least questionable.

c. There was info re the conditions of his (the Plaintiff's) unfavorable separation from that agency (the Office of Economic Opportunity).

These actions were taken maliciously as reprisals against the Plaintiff for previous complaints of racial discrimination made by the Plaintiff against the Office of Economic Opportunity and were taken to deny the Plaintiff equal employment opportunity in the Department of Commerce's processing of the Plaintiff's applications for employment therein.

8. The Civil Service Commission stated to the Department of Commerce that the Commission was contemplating barring BREES (the Plaintiff) from Federal employment. Such

action continued a five (5) year pattern of reprisals against the Plaintiff for previous complaints of racial discrimination. The Plaintiff has never been barred from Federal employment. The Civil Service Commission abused its administrative discretion by using innuendo that the Plaintiff was "unsuitable" to influence the Department of Commerce to deny the Plaintiff employment without notification to the Plaintiff and without affording the Plaintiff the opportunity to defend against such charge.

9. Since 1969, the Civil Service Commission has taken reprisal actions to deny the Plaintiff Civil Service employment at a grade commensurate with his education and experience. The Plaintiff never withdrew applications for Civil Service Registers under Announcements Numbered 420 and 425 (or earlier versions thereof)

which he filed with the Commission in 1967, 1968, and 1969. The Commission has never returned said applications to the Plaintiff. Yet, the Commission has failed and/or refused to place the Plaintiff on Civil Service Registers for Announcements Numbered 420 and 425 in the Washington Area Office although the Plaintiff has repeatedly been found qualified for such positions in other Commission Area Offices. Throughout this period, the Civil Service Commission advised the Plaintiff that he ws eligible for employment in the Federal Service by reinstatement because of his Veterans' Preference; then, by means of inneundos of "pending unsuitability determination", as well as by withholding the Plaintiff's name from Civil Service Registers for which he was qualified, the Civil Service Commission has effectively debarred the Plaintiff from appropriate Civil

Service employment for a period of more than five (5) years, thus denying him both employment and opportunity for promotions during this period based upon his ability, education, experience, and performance, without taking required formal action for debarment under the provisions of 5 CFR PART 731 which is subject to procedural and substantive defense safeguards.

10. Even though the Civil Service Commission informed the Plaintiff in writing in April 1969 that any Government agency could hire him and the Civil Service Commission would interpose no objection, the Civil Service Commission refused to assist the Plaintiff in obtaining Civil Service employment under the Employment of the Rehabilitated Offender in the Federal Service Program because the Bureau of Personnel Investigations of the Civil Service Commission refused to place the

Plaintiff's name on Civil Service Registers in the Washington Area Office of the Commission.

11. The Department of Commerce, the Office of Economic Opportunity, and the United States Civil Service Commission used nonmerit and racially discriminatory factors and standards to judge the Plaintiffs suitabililty for Federal employment in violation of 5 CFR PARTS 300 and 713.

12. The actions of the Department of Commerce, the Office of Economic Opportunity, and the Civil Service Commission in concert denied the Plaintiff equal employment opportunity, violated his Veterans' Preference rights, and violated his rights as a citizen under the Fourteenth Amendment to the Constitution of the United States by depriving him, without due process of law, of his right to employment and income from a Civil Service position

on an equal basis and under the same criteria applied to other applicants for Federal employment.

WHEREFORE, Plaintiff prays in the alternative:

A. As to the Office of Economic Opportunity and the Civil Service Commission:

1. Promotions with the Office of Economic Opportunity (now the Community Services Administration) to

a. GS-13 effective in October 1968,

b. GS-14 effective in October 1969,

c. GS-15 effective in October 1970,

d. plus within-grade promotions as a GS-15 subsequent to Otober 1970.

2. Back pay and all other rights accruing to the promotions prayed for in paragraph 1.

3. Transfer to or conversion to a CAREER appointment with the Office of Education, effective April 14, 1974, as a GS-13, Step 10.

OR

B. As to the Department of Commerce and the Civil Service Commission:

4. Appointment to one of the following positions with the Department of Commerce for the period November 4, 1973, through April 13, 1974:

a. Computer Specialist, GS-0334-14, Step 1.

b. Computer Specialist, GS-0334-13, Step 6.

5. Back pay and all other rights accruing to the appointment prayed for in paragraph 4.

6. Transfer to or conversion to a CAREER appointment with the Office of Education, effective April 14, 1974, as a GS-13, Step 6 or Step 7.

AND

C. As to all of the foregoing agencies:

7. And for such other and further relief as to the Court may seem just and appropriate.

Tracy E. Mulligan
Attorney for Plaintiff
416 Hungerford Drive
Rockville, MD 20850
(301) 340-9670

DISTRICT OF COLUMBIA, ss:

Earl R. Brees, being first duly sworn on oath, says the foregoing is a just and true statement of the facts to the best of his information, knowledge, and belief.

Earl R. Brees, Plaintiff

Subscribed and sworn to before me this ___ day of February, 1975.

Notary Public,
District of Columbia

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

EARL R. BREES, 10103 Towhee Avenue Adelphia, MD 20783, Plaintiff, v. ROBERT E. HAMPTON, individually, and as Chairman of the United States Civil Service Commission, 1900 E Street, NW Washington, D.C. 20415, and ROBERT H. DRUMMOND, JR. individually, and as Director of the Bureau of Personnel Investigations, United States Civil Service Commission, 1900 E Street, NW Washington, D.C. 20415, and	*	C.A. #74-972 Complaint

ALVIN J. ARNETT, individually, and as Director of the Office of Economic Opportunity, 1200 - 19th St., NW Washington, D.C. 20506, *

Defendants. *

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

Plaintiff, Earl R. Brees, by his attorney, Tracy E. Mulligan, complaining of the defendants, alleges:

1. Jurisdiction. This action arises under Section 717(c) of the Civil Rights Act of 1964, as amended on 24 March 1972. Plaintiff has exhausted his administrative remedies as shown in the decision of the Board of Appeals and Review, United States Civil Service Commission (hereafter Commission) in letter dated 8 May 1974, cover letter to Plaintiff dated 24 May 1974, copy attached, Exhibit A, with the following enclosures:

(a) Plaintiff's letter dated 5 January

1974 requesting the assignment of an EEO Counselor under the provisions of 5 CFR (Code of Federal Regulations) 713.213.

(b) Plaintiff's letter dated 11 January 1974, amending enclosure (a) above, requesting the necessary directives and the necessary forms to enable him to file a formal complaint of discrimination for actions in violation of 5 CFR PART 713 and similar directives.

(c) Commission letter dated 18 January 1974 rejecting the complaint in enclosure (a) above.

(d) Plaintiff's letter dated 4 February 1974, treated by the Commission as an appeal from the decision in enclosure (c) above, and

(e) Plaintiff's letter dated 28 January 1974, which Plaintiff considers to be his formal complaint but which was ignored by the Commission.

2. Parties. The Plaintiff is a United States citizen, an honorably discharged disabled veteran with over eleven (11) years of military service in the Armed Forces of the United States, and entitled to Veterans' Preference for employment in the Civil Service of the United States.

The Defendants are:

Robert E. Hampton, individually, and as Chairman of the United States Civil Service Commission,

Alvin J. Arnett, individually, and as Director of the Office of Economic Opportunity, and

Robert H. Drummond, Jr., individually, and as Director of the Bureau of Personnel Investigations, United States Civil Service Commission.

All of the Defendants are officials in agencies of the Executive Department of the United States Government and subject

to the laws of the United States and to the provisions of the Code of Federal Regulations (CFR).

3. Type of Proceeding. Plaintiff seeks the following relief:

(a) To set aside the Plaintiff's resignation which was effective on 6 September 1972 from a Civil Service position in the Office of Economic Opportunity on the basis that it was obtained by the Government based on racial discrimination, was voidable because entered into under duress, and was void for lack of legal consideration (copy attached, Exhibit B).

(b) For reinstatement with back pay including in-grade promotions and other promotions from October 1968 and with full transfer rights accorded to other employees of the Office of Economic Opportunity upon its pending dissolution.

(c) For damages for reprisals taken against the Plaintiff by the Commission and the Office of Economic Opportunity for complaints of racial discrimination, by abuse of discretion, by violation of the provisions of the Code of Federal Regulations and the Federal Personnel Manual, and by misuse of the administrative process

(1) to unduly or indefinitely delay decisions on Plaintiff's comlaints of racial discrimination,

(2) to unduly or indefinitely delay decisions on Plaintiff's applications for Civil Service employment,

(3) to prevent the Plaintiff from obtaining Civil Service employment from July 1971 to March 1974, and

(4) to disseminate false, derogatory, and libelous reports about the Plaintiff to hiring officials in other

agencies.

(d) For damages for racial discrimination to deny Civil Service employment to Plaintiff, and for failure and refusal to process Plaintiff's complaints of racial discrimination and to apply employment standards and regulations to the Plaintiff without racial discrimination in accordance with the requirements of the Civil Rights Act of 1964, the Code of Federal Regulations and the Federal Personnel Manual.

(e) For an order requiring the United States Civil Service Commission to show cause

(1) why the Plaintiff should not be certified as eligible for Federal employment and his name placed on Civil Service registers for positions for which he has applied and is otherwise qualified, including, but not limited to, eligibil-

ity rosters under Announcements Numbers 420 and 425,

(2) why the United States Civil Service Commission should not be required to reveal to the Court the contents of both classified and unclassified files and reports on the Plaintiff, and to delete therefrom false derogatory information prejudicing Plaintiff's Civil Service employment, and

(3) why the Civil Service Commission and its employees should not be ordered to cease and desist from using their administrative authority to take personal reprisals against the Plaintiff in denying him Federal employment in violation of his Civil Rights and his Veterans Preference rights.

4. Statement of Claim. The Plaintiff alleges:

(a) He is a United States Citizen, a

disabled veteran receiving compensation from United States and entitled to ten-point (CP) veterans preference for Civil Service employment, and an Infantry combat veteran with more than twenty (20) years of combined military and civilian Government Service; during his military career, he received five (5) Honorable Discharges, and he is a veteran of World War II and the Korean Conflict.

(b) He has received ratings as high as 108 CP out of a possible maximum of 110 on Civil Service examinations; and he has been rated for positions from GS-5 through GS-13 as an Accountant, Auditor, Systems Accountant, Computer Programmer, Computer Systems Analyst, or Computer Specialist by Commission Area Offices outside Washington, D.C., and by the Operations Support Division of the Commission in Washington, D.C., during the period October 1973

through March 1974.

(c) He was convicted of a misdemeanor, "Attempted False Pretenses," in the District of Columbia Court of General Sessions in 1967, for an offense committed while in private civilian employment. Imposition of sentence was suspended by the Court. Plaintiff has no other convictions.

(d) The Federal Government, under regulations promulgated by the United States Civil Service Commission (hereafter Commission) has adopted a policy of hiring "rehabilitated offenders". Factors to be considered and actions that an offender can take to show that he is a "rehabilitated offender" are stated in the Federal Personnel Manual, Chapter 306, Subchapter 7, extract attached, Exhibit C. These include nature and seriousness of the offense and subsequent education and

subsequent successful work history of the offender.

(e) Plaintiff's actions taken since 1967 that show he is a "rehabilitated offender" are shown on Exhibit D, attached, and include as major evidences of rehabilitation, subsequent education including a Master's degree from American University, near completion of a Doctoral degree, and a successful work history since the conviction.

I

(f) Using this misdemeanor conviction as the basis, for the past five (5) years (from March 1969 through 13 April 19740, the Defendants or their subordinate employees have systematically denied the Caucasian Plaintiff employment, and certification of eligibility for employment, in the Federal Civil Service while hiring, or approving for employment, convicted Negro

felons with far less evidence of rehabiitation, in violation of the Plaintiff's rights to Equal Employment Opportunity. This effective debarment has been accomplished by the Commission without taking formal debarment action in accordance with 5 Code of Federal Regulations 731.303. FOrmal debarment thereunder is limited to a maximum of 3 years.

(g) To accomplish this effective debarment, the Commission and its employees so abused the administrative process as to deny the Plaintiff his administrative remedies to racially discriminate against the Plaintiff and to take reprisals against him for complaints of racial discrimination by repeatedly delaying "determination of suitability for placement on Civil Service Registers" in the Washington Area Office of the Commission; by advising hiring agencies that the

Commission was "conducting an investigation to determine the Plaintiff's suitability and eligibility for Federal employment," thereby blocking Plaintiff from consideration until positions were filled by non-veterans or less-qualified applicants, or until positions were canceled; and by furnishing the hiring officials with false derogatory and libelous information about the Plaintiff; and by violating the provisions of Title 5 of the Code of Federal Regulations (CFR) designed to prevent such discrimination and reprisal, as hereafter more fully set forth.

(h) Based upon ratings attained on competitive examinations and the Plaintiff's education and experience, and with full disclosure of the aforesaid conviction on his application form, the Plaintiff, on three (3) occasions in three (3) separate offices (U.S. Department of

Commerce as a GS-13 Computer Specialist; U.S. Department of Health, Education, and Welfare as a GS-11 Management Analyst; and the Commission Bureau of Retirement and Insurance as a GS-13 Internal Auditor (Data Processing) was verbally notified by operating officials that he had been selected for employment, and then has been refused said employment by Government personnel officers based upon false derogatory information furnished by the Commission and by the Office of Economic Opportunity, or subordinate elements thereof, or by continuing delay of the Bureau of Personnel Investigations to make a determination as to whether or not the Plaintiff is suitable and eligible for Federal employment.

(i) Plaintiff has filed more than forty (40) applications for Federal employment for GS-05 through GS-13 positions in

the Washington, D.C. Area, for which he was qualified. At least five (5) of these were with the Department of Commerce in response to announced vacancies, but between October 1973 and March 1974 the Personnel Office refused to hire the Plaintiff for any of five (5) positions for which he was qualified -- GS-05 through GS-07 Secretary; GS-11/12 Computer Progammer; GS-11/12 Computer Systems Analyst; GS-12 Systems Accountant; and GS-13, Step 06, Computer Specialist -- stating that this was because they had not received a pre-employment investigation report from the Bureau of Personnel Investigations of the Commission. This investigation has been started in October 1973. In early January 1974, Mr. Mattox, a responsible official of the aforesaid Bureau of Personnel Investigations, told the Plaintiff that the investigation was

completed and the written report and the decision on his eligibility would be expedited. In June of 1974, the report is still pending.

(j) Commission employees in regions or areas of the United States (outside the Washington Area Office of the Commission), i.e., San Antonio, Texas; St. Louis, Missouri; Oklahoma City, Oklahoma, using the same uniform standards applicable to all such offices including the Washington Area Office, evaluated the Plaintiff's applications for Federal employment, which in identical form were sent to all offices, and certified the Plaintiff as eligible for Federal employment in the highest category for consideration (a compensable eligible (CP)) under Announcements Numbered 420 and 425 as an Accountant, Auditor, IRS Agent, Computer Programmer, Computer Specialist Analyst, and

Computer Specialist. The Plaintiff's examination scores placed him at or clsoe to the top of this category with ratings as high as 108CP out of a possible 110 points. The Washington Area Office of the Commission has refused to accept transfer of eligibility under Announcement Number 425 since January 1974.

(k) In Washington, D.C., on 25 October 1973, the Plaintiff was placed on a Civil Service Register under Announcement Number 408 for Senior Level Positions (as applicant number 192685). This application was not processed by the Washington Area Office. The Washington Area Office processes applications for positions at grades GS-12 and below only. The Plaintiff's applications for the Senior Level Positions were reviewed and approved by the Operations Support Division of the Bureau of Recruiting and Examining of the Commis-

sion in Washington, D.C. Plaintiff was further placed on "CERTIFICATES" showing that he was at or near the top of the Register and eligible for employment in the Civil Service as an Auditor, GS-13, and as a Systems Accountant, GS-13; he was also referred to another Federal agency by the Commission for a position as a Computer Specialist or Computer Systems Analyst, GS-13. The Plaintiff ws hired as a result of a "CERTIFICATE" from the Civil Service Register for Announcement Number 408 as a GS-13 Systems Accountant (GS-0510-13) by the Office of Education, Department of Health, Education, and Welfare effective 14 April 1974. However, an adverse decision on the above described investigation still pending in the Bureau of Personnel Investigations could again cause Plaintiff's removal.

(1) It should be particularly noted

that a major part of this action is based on Plaintiff's complaint of racial discrimination and reprisal carried out by the Commission particularly including its Bureau of Personnel Investigations and the Washington Area Office of the Commission (as well as by the Office of Economic Opportunity) against the Plaintiff for more than five (5) years). A chronology of Plaintiff's employment with the Office of Economic Opportunity and the subsequent actions taken against him, are grouped as follows in succeeding paragraphs.

> 27 August 1967 through 3 August 1968, Plaintiff's first employment and first firing by the Office of Economic Opportunity. (par. m below)
>
> 4 August 1968 through 3 February 1969, Plaintiff's appeals and Commission order for reinstatement. (par. n below)

4 February 1969 through 7 March 1969, token reinstatement and second firing by the Office of Economic Opportunity. (par. o below)

8 March 1969 through 6 July 1971, Plaintiff's appeals of the second firing. (par. p. below).

The Taylor Memorandum of 7 July 1971, signed by Stanley N. Taylor, Chief, Division of Adjudication and Appraisal, Bureau of Personnel Investigations, United States Civil Service Commission and endorsed by the Director of the Bureau of Personnel Investigations to Mr. Frazier (Director, Federal Equal Employment Opportunity Program of the Civil Service Commission) who was the highest Civil Service Commission official responsible for the proper investigation of the Plaintiff's complaints of racial discrimination and reprisals carried out by the Office of Economic Opportunity. (par. q below)

6 August 1971, Plaintiff's "reinstatement" and coerced resignation. (par. r below)

7 August 1971 through 6 September 1972, appeals within the Office of Econo-

mic Opportunity and complaints of racial discrimination and reprisals which were not processed as required by the Code of Federal Regulations. (par. s below)

7 September 1972 until the Present. (Discussed in Section I above.)

II

(m) - 27 August 1967 thruogh 3 August 1968. The Plaintiff transferred from a GS-09 position in the Bureau of Land Management to the Office of Economic Opportunity, hereinafter called the Agency, with a promotion to Systems Accounant, GS-11.

(1) On 22 October 1967, the Plaintiff was promoted by the Agency to Systems Accountant, GS-12, for "outstanding" work.

(2) In April 1968, the Plaintiff's supervisor prepared a special position description to promote the Plain-

tiff to Systems Accountant, GS-13, for "outstanding" work.

(3) In May 1968, the Plaintiff was recommended for a Quality Increase in Compensation for "outstanding" work.

(4) On 27 June 1968, Plaintiff was given a notice of proposed removal by the Agency, charged with "falsifying an appointment document".

(5) On 3 August 1968, Plaintiff was discharged by the Agency.

(6) Between notification on 27 June 1968 and discharge on 3 August 1968, the Plaintiff complained of racial discrimination to the Civil Rights Compliance Officer and the Deputy Director of the Office of Civil Rights of the Agency. The Civil Rights Compliance Officer of the Agency testified at the November-December 1969 Hearing of the Plaintiff within the Agency that his office attempted to stop

the firing of the Plaintiff. (A 1971 memorandum by Wilfred Leland, the aforesaid Civil Rights Compliance Officer, stated that the Plaintiff had submitted a complaint in July 1968 but that his memorandum of record could not be found.)

(n) 4 August 1969 through 3 February 1969. This discharge was appealed to the Commission under the provisions of 5 CFR PART 752. The Appeals Examining Office, which handled the appeal, found that the charge was totally unfounded and in January 1969 ordered the Agency to restore the Plaintiff to duty.

(l) Upon receipt of this Commission decision and without appealing therefrom, the Agency instructed the Plaintiff to come to the Agency for a meeting. Present were Mr. Howe, Director of Personnel for the Agency; the Plaintiff; and Mr. Campbell and Mr. Vela, representatives of

the American Federation of Government Employees Union.

(2) At this meeting, Mr. Howe stated that management had only two choices, "If Mr. Brees (Plaintiff) insists on coming back to work, he will be fired immediately. Or he can resign and he will be given a clean Standard Form 50. And we will put any reason he wants for resigning." (The Plaintiff contends that at this point the coercion to force his resignation started.)

(o) 4 February 1969 through 7 March 1969. The Plaintiff refused to resign and returned to work on 4 February 1969 at the Agency. On the same day, Mr. Brees (Plaintiff) received his second eltter of proposed removal signed by Mr. Cassidy, Assistant Director of OEO, predated 31 January 1969. The basis stated therein ws "fraud and deception" and "criminal con-

duct".

(1) On any proposed removal, Civil Service employees are required to be given 30 days' notice.

(2) On 7 March 1969, Plaintiff was fired for the second time by the Agency. Durinkg that 30-day period, rather than being restored to duty, the Plaintiff was given a desk in a storeroom and no assignments, although he begged the supervisors for work.

Title 5 of the Code of Federal Regulations (hereinafter 5 CFR), Section 772.306, Decision on Initial Appeal, provides as follows:

> "(a) The office of the Commission having initial jurisdiction of the appeal, after making such investigation as it considers necessary, shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this

part shall contain findings, recommendations for any corrective action required, and notification of the right of either party to appeal to the Board of Appeals and Review. In addition, the decision on each appeal under Subpart H, Part 315, and Subparts B and C of Part 752, Part 754 of this chapter, and subpart L of Part 831 of this chapter, shall include an analysis of the findings and a statement of the reasons for the conclusions reached. Except as provided in paragraph (b) of this section, the agency shall report, within 7 calendar days after receipt of the decision, that it has carried the decision into effect or that it is appealing the decision to the Board."

"(b) When an employee makes a timely appeal to the Board of Appeals and Review under §772.307 from a decision of the Appeals Examining Office affirming an adverse decision of the agency under Part 754 of this chapter or when an employee or agency makes a timely appeal under §772.307 from a decision of the Appeals Examining Office or regional office affirming or reversing an adverse decision of the Bureau of Retire-

> ment and Insurance under Subpart L of Part 831 of this chapter, that decision may not be given effect until the Board of Appeals and Review has adjudicated the appeal."

The above cited provisions of the Code of Federal Regulations were not complied with by the Agency.

(p) 8 March 1969 through 6 July 1971. In March 1969, the Plaintiff appealed the second firing within the Agency under the provisions of 5 CFT PART 752 and PART 771. A hearing as held eight (8) months later in November 1969 (see below).

(l) On 15 November 1969, the Plaintiff filed a second complaint of racial discrimination with the Office of the Director of the Agency under the provisions of 5 CFR PART 713. The com-

plaint was ignored by the Agency, and no action was taken until later ordered by the Commission.

(2) In late November 1969, a hearing on the Plaintiff's appeal was held at the Office of Economic Opportunity. The Hearing Committee, appointed under the provisions of 5 CFR PART 771 was composed of a retired General, a retired Colonel (an attorney), and the OEO Mid-Atlantic Regional Counsel (an attorney). The hearing lasted five (5) days. Both sides submitted briefs to the Hearing Committee. The recommendation of the Hearing Committee was unanimous that the Plaintiff be reinstated from the second firing. The Report of the Hearing Committee, dated 6 March 1970, stated, inter alia, that the Agency's action in effectuating the second (7 March 1969) discharge was "not taken in good faith", that rather than reinstate

the appellant and try to live with the situation, OEO made the decision to terminate him (Plaintiff) again come what may * * * that the mind of the agency was closed and his discharge predetermined. The following extracts are quoted from the report:

> "In this case, Mr. Brees (Plaintiff) was clearly a superior worker. This was admitted by agency witnesses who supervised him."
>
> "The agency, for its part, determined that appellant would never again work for OEO."
>
> "We find that the agency's action in effectuating the second discharge (7 March 1969) was not taken in good faith. Rather than reinstate appellant and try to live with the situation, OEO made the decision to terminate him again, come what may."
>
> "The testimony of Mr. Brees (Plaintiff) and Mr. Cassidy (removing official) convinces us that no matter what facts or arguments he

presented in his own behalf, the mind of the agency was closed and his discharge predetermined."

(Note: 5 CFR 752.202(b) and the Veterans" Preference Act required that:

" If the employee answers, the agency shall consider his answer in reaching its decision.")

"We find that the underlying cause for the second discharge ws the agency's hostility to Mr. Brees (Plaintiff) which had built up since the first discharge and which he had exacerbated by his victory at the Civil Service Commission. We find that the agency rationalized its predetermined decision not to reinstate appellant (Plaintiff) by setting forth the two reasons already discussed."

"* * * the testimony was uncontradicted that Mr. Brees (Plaintiff) was an outstanding employee. On October 22, 1967, he ws promoted to GS-12. In addition, he was recommended for a quality increase.

> During this time he was assigned primarily to head up a task force composed of employees from various branches of OEO, some of whom had higher grades than he did."
>
> "He was given no opportunity to work at any job, including one not concerned with finances."
>
> "The problem is particularly aggravated in this case because the failure to elicit the full information on appellant's criminal involvement is entirely the fault of the agency."

Copy of the Report of the Hearing Committee, Exhibit E, is attached.

(3) The Hearing Committee submitted its recommendations to the appellate official, nominally the Director of the Agency, but delegated to the Deputy Director, Wesley Hjornevik. While his decision was pending, the Office of General Counsel of the Agency submitted a brief to the appellate official. The Plaintiff's attorney asked Mr. Briley, Assistant

General Counsel for the Agency, for permission to do the same -- to file an appellate brief. Mr. Briley denied the Plaintiff's counsel the opportunity to submit a brief.

(4) On 31 March 1970, Mr. Hjornevik issued the appellate decision (Exhibit F). He cleared the Plaintiff of charges of fraud and deception, but found that the Plaintiff should remain fired for the criminal conduct charge (a misdemeanor while in private employment).

(5) In April 1970, the Plaintiff appealed to the Civil Service Commission under the provisions of 5 CFR PARTS 752, 771, and 772.

(6) In August 1970, the Appeals Examining Office of the Commission remanded the case to the Agency because the Agency had violated 5 CFT PARTS 713 and 771.

(7) Under 5 CFR PART 772, the Agency had fifteen (15) days in which to appeal to the Board of Appeals and Review. The Agency appealed more than thirty (30) days later. The appeal was accepted by the Board of Appeals and Review.

(8) In January 1971, the Board of Appeals and Review remanded the case a second time, affirming the decision of the Appeals Examining Office.

(9) In February 1971, the Agency started to process the Plaintiff's complaint of racial discrimination filed 15 November 1969 -- fifteen (15) months before.

> 5 CFR PART 713 at that time provided that a complaint of racial discrimination should be processed within sixty (60) days.

(10) In April 1971, an EEO Counselor was appointed, Mr. Wilmer S. Hunt. Mr. Hunt's EEO report, filed 11 June 1971

said, inter alia:

> While discrimination because of race may not be supported with the required facts (because the agency refuses to make available the serious criminal records of Negro felons in order to compare the treatment of Negro felons with the treatment of the Appellant -- a Caucasian misdemeanant), the sequence of events point quite strongly to the possibility of discrimination in the form of reprisals against Mr. Brees because he filed a complaint of discrimination. This possibility crystalizes itself more and more when one considers why OEO was so apparently determined to fire Mr. Brees rather than choose a less harsh, but equally effective remedy * * *."
>
> "* * * it is difficult to understand why OEO would be unwilling to simply transfer Mr. Brees to a position unrelated to finance."
>
> Attachment I reflects Mr. Brees' evidence of rehabilitation which, in anybody's book, is impressive. This display also raises the question of why Mr. Brees had to be fired rather than

transferred. Attachment J further emphasizes Mr. Brees' ability to perform elsewhere within the Agency."

"All these attachment(s) and other enumerations are made to show that there is cause to believe that the second firing of Mr. Brees has the 'smell' of reprisal because he charged discrimination for the first firing * * *."

"Nowhere in all the documents filed by OEO is there any attempt to explain why Mr. Brees could not have been transferred to a different post of duty, and it is this point that makes the Counselor suspect Agency reprisals against Mr. Brees."

"This report is filed late only because verbal agreements with the Human Rights Director resulted in the undersigned's understanding that a report might not have to be written since a probable settlement was imminent during the Counselor phase."

(11) In June 1971, the Agency appointed an EEO Investigator under 5 CFR 713.216. This "investigator" was a subordinate of one of the Respondents against

whom the Plaintiff's complaint had been made. This violated the provisions of 5 CFR 713.216. Plaintiff protested to the Commission, and the investigator was removed.

(12) In June 1971, the Agency requested that the Commission take over the case on a reimbursable basis. The investigation was transferred to the Office of the Director, Federal Equal Employment Opportunity Program, United States Civil Service Commission. The Director was Mr. James Frazier, Jr.

(13) Mr. James Frazier, Jr., asked the Bureau of Personnel Investigations to investigate the case, and the investigation was referred to the Chief, Division of Adjudication and Appraisal, Mr. Stanley N. Taylor.

(In March 1969, the Plaintiff had filed a complaint of racial discrimination

against the said Stanley N. Taylor. The complaint was ignored by the Commission and not processed.)

(q) The Taylor Memorandum of 7 July 1971. The response of Mr. Stanley N. Taylor, Chief, Division of Adjudication and Appraisal, to his superior, Kimbell Johnson, Director, Bureau of Personnel Investigations, was contained in a Memorandum, dated 7 July 1971, subject: "Request for Investigation of Discrimination Complaint by Mr. Earl R. brees". This was forwarded by Kimbell Johnson to Mr. James Frazier, Jr., Director, Federal Equal Employment Opportunity Program, United States Civil Service Commission. A copy of this Memorandum is attached, Exhibit G, and incorporated herein by refernce thereto. This Memorandum contains:

(1) False information, labeling the Plaintiff as having been convicted in

the United States District Court for the District of Columbia of false pretense. At the time (1967) of this alleged conviction, the United States District Court for the District of Columbia had exclusive felony jurisdiction in the District of Columbia. The Plaintiff has never been a defendant in said Court and has never been convicted of a felony.

(2) False information, labeling the Plaintiff as utterly unscrupulous and a falsifier of documents.

(3) False information, labeling the Plaintiff as having "adjusted the filing dates of his several applications to make it appear that he filed before he was formally convicted of false pretense".

(4) False information, labeling the Plaintiff as having "perverted" the appeals system of the Federal Government.

(5) False information to the

effect that "it is absolutely asinine to state that Brees (the Plaintiff) had been 'cleared' by anyone" when the Plaintiff had been "cleared" in the administrative process by the Deputy Director of the Agency of all wrongdoing as a Federal employee and that at the time this memorandum was written the Plaintiff stood accused of no wrongdoing as a Federal employee.

(6) By innuendo, anyone dealing with Mr. Brees is told to expect abuse and harassment from him.

The Plaintiff alleges that this Memorandum or its false derogatory contents have been circulated within the Commission, to the EEO Investigator, Mr. Anderson, appointed on or about 20 July 1971, to investigate the Plaintiff's November 1969 complaint of racial discrimination, and to hiring agencies to block

proper investigation of Plaintiff's charges Anderson, appointed on or about 20 July 1971, to investigate the Plaintiff's November 1969 complaint of racial discrimination, and to hiring agencies to block proper investigation of Plaintiff's charges of racial discrimination, to effectively debar the Plaintiff from employment in the Federal Civil Service and from examination for Federal employment as a reprisal for the Plaintiff's bringing charges of racial discrimination and reprisals.

(r) 6 August 1971 "Reinstatement" and Plaintiff's Coerced Resignation.

(1) Plaintiff's second firing (7 March 1969) by the Agency had been found by the Hearing Committee (supra, paragraph p) to have been improper as to the merits, although their recommendations were ignored by the Agency. It had been remanded twice

after that by the Civil Service Commission because it had been accomplished in violation of the procedural safeguards for Civil Service employees contained in the Code of Federal Regulations. Plaintiff had not been legally discharged.

(2) In a meeting on or about 22 July 1971, the Plaintiff, a Caucasian, had been refused reinstatement and restoration to duty by Ernest Russell, a Black official who was the Associate Director for Administration for the Office of Economic Opportunity. At that meeting, before agreeing to resignation as the price of reinstatement with back pay, Plaintiff had been told by Mr. Trachtenberg, Office of General Counsel, Office of Economic Opportunity, that:

> If you do not agree to this, you will get nothing. We do not have to do anything. We won't answer the investigator's questions and we will answer none of your questions.

The Agency had demonstrated fully its power to not answer the questions and the letters of the Plaintiff, and the Civil Service Commission also refused to answer similar letters. Throughout the efforts of the Plaintiff to fight his removal from the Agency, the Agency and the Civil Service Commission repeatedly refused to respond to his questions concerning the charges against him, questions concerning statistics for Black convicted members of the Agency and statistics on the treatment of Caucasian and Black members of the Agency who had been convicted of offenses against the law.

(3) The ivnestigation of the Plaintiff's November 1969 complaint of racial discrimination had been delayed to July 1971, and then prejudiced by the Taylor Memorandum of 7 July 1971, supra,

that had been given to the highest Equal Employment Opportunity Officer in the Civil Service Commission and forwarded to the 713.216 Investigator before "investigation" started. The investigation was never completed.

(4) The Plaintiff first saw the aforesaid Taylor Memorandum near the end of July 1971. Plaintiff lost all hope of any subsequent objective decision by the Commission. The power of the Bureau of Personnel Investigations to affect Civil Service careers is self-evident to every Government employee. Any "investigator" selected from within the Civil Service, with the Taylor Memorandum in his hand, would be understandably reluctant to defy them in his report; and the futility of the Hearing Committee Report of March 1970 suggests such report would be useless in any case.

(5) The Taylor Memorandum of 7 July 1971 merely suggested that "it would e cheaper for OEO to pay Mr. Brees his regular salary to stay home". Within a month, OEO had reinstated the Plaintiff with back pay in exchange for his "resignation".

(6) The Plaintiff had been denied employment for nearly two and one-half years and was in desperate financial straits.

(7) The Resignation Agreement (Exhibit B) was drafted and typed in the Office of the General Counsel of the Agency. Prior to signing it, Plaintiff had sent letters to the Civil Service Commission and to the Director of the Agency, complaining that he was being coerced into signing it. No answer has been received to either letter even though said letters were in the files of both

agencies prior to the time the Agreement was signed. Both the Government and the Plaintiff knew, when the Agreement was signed by both, that its contents were not true.

(8) Paintiff further alleges that the contract is void as without consideration from the Government. Plaintiff alleges that he had been illegally removed from his position, on the merits of the matter; that there were disqualifying procedural defects in said removal; that he had been racially discriminated against in the application of standards to judge "rehabilitated" offenders; that his right to prompt and proper investigation of his complaint thereof, made in November 1969, violated and denied; that his second discharge was accomplished in violation of the safeguards provided to employees by law and by Title 5, CFR, as shown by the

discharge action being remanded by the Civil Service Commission to the Agency; that the Commission Reinstatement Order after the first firing had not been complied with in good faith as required by 5 CFR, and is still valid; and that therefore Plaintiff's second firing in March of 1969 was illegal and void; that Plaintiff was already entitled to the full amount of back pay offered as consideration in the Agreement dated 6 August 1971 (Exhibit B). Therefore, the back pay was no new consideration. The granting of pay for accrued annual and sick leave was also payment of a prior debt, and no new legal consideration.

(9) The legal effect of the reinstatement of any employee as provided in 5 CFR is given in 5 CFR 550.803 and 550.804.

(a) 550.803(a). "The require-

ment for an administrative determination referred to in the phrase 'on the basis of an administrative determination or a timely appeal' in section 5596 of title 5, United States Code, is met when an appropriate authority in an agency makes a decision on its own initiative in a case involving an unjustified or unwarranted personnel action. The decision may be oral but shall be confirmed in writing." (underlining added)

(b) 550.803(d). "To be unjustified or unwarranted, a personnel action must be determined to be improper or errorneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action."

(c) 550.804(e). "When an appropriate authority corrects an unjusti-

fied or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account (limiting the accumulation to the maximum prescribed by law or regulation for the employee) of the employee as if the unjustified or unwarranted personnel action had not occurred and the employee shall be deemed for all purposes to have rendered service in the agency for the period covered by the corrective action.

* * *"

The Plaintiff alleges that reinstatement could have been made only if the second firing had been determined to be unjustified or unwarranted and that therefore there was no consideration in the agreement for Plaintiff's resignation, on this basis as well as those stated above.

(s) 7 August 1971 to 6 September 1972. This period covered the time that Plaintiff was carried as a Civil Service employee with pay until annual and sick leave were exhausted or no longer granted (November 1971) and thereafter to 6 September 1972 in a leave without pay status, under the aforesaid Agreement.

(1) During this period, Plaintiff repeatedly requested that his resignation be withdrawn. Although, as drafted by the Office of General counsel of the Office of Economic Opportunity it provided on its face that it was "irrevocable", such a provision is in conflict with 5 CFR 715.202(b), which states:

> "Withdrawal of resignation. Except as provided in this paragraph, a resignation is binding on an employee once he has submitted it. An agency, in its discretion, may permit the employee to withdraw his resignation at any time before it has

> become effective. An agency may decline a request to withdraw a resignation before it has become effective only when it has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason." (33 F.R. 12482, Sept. 4, 1968, as amended at 36 F.R. 9765, May 28, 1971)

Plaintiff alleges that the stated reasons given by the Office of Economic Opportunity for refusing to accept his withdrawal of the resignation were not made in good faith, and the real reason was either to avoid processing an adverse action against the Plaintiff in the face of numerous still pending and unprocessed racial discrimination complaints, or to avoid good faith compliance with the first Commission Order for Reinstatement.

(2) Even after the Agreement was signed, during the annual leave period and the leave without pay period, Plaintiff sought to return to work at the Agency and was refused permission to return to work by Ernest Russell, Association Direction for Administration of the Agency, even though the Plaintiff's supervisor was willing to accept him back on duty.

(t) The Plaintiff alleges and verily believes that Government officials have been denying the Plaintiff his rights to employment as a disabled veteran because of a "secret" report prepared and circulated by the Civil Service Commission. Page 806 of the Transcript of the Plaintiff's Hearing held in the Office of Economic Opportunity in November-December 1969 reflects:

> "GENERAL O'FLYNN: You just mentioned that you showed the file to Mr. Cassidy

(the removing official). Was this the file containing the information furnished you by the Civil Service Commission?

THE WITNESS: Yes, sir.

GENERAL O'FLYNN: Or your own file?

THE WITNESS: The Civil Service Commission file."

The Plaintiff has never been confronted with the contents of this file, even though said file has been used in deciding on his discharge from the Agency and to impede his employment with the Government.

III

(u) The Plaintiff is unable to accept or to follow the reasoning stated in the decision of the Board of Appeals and Review in the letter dated 8 May 1974, attached as Exhibit A. It appears to be based on narrowly legalistic reasoning, totally at variance with the broad intent

of the Congress to stop racial discrimination, and the strong affirmations contained in 5 CFR and the Federal Personnel Manual that the Commission intends to carry out that intent.

(1) Plaintiff challenges the statement on page 1, repeated on page 3, that no proper basis exists on which the Agency could have accepted your complaints for processing because "no selection had been made, and no evidence in the record that a final decision to reject has been made". The fact that the Plaintiff had been selected by the operating official and then, contrary to what was intended, for the Commission to require or allow the personnel office to delay filling the position to prevent putting the Plaintiff on the payroll, would itself be discrimination or reprisal. One of the Plaintiff's allegations of discrimination is that

exactly that abuse of administrative process and discretion has been used to discriminate or take reprisal against him for his previous discrimination complaints in other hiring actions. And certainly the Plaintiff can not be expected to put in the record the secret determination of the Commission or its employees as to whether or not a final decision to reject has been made. The decision of the Board of Appeals and Review does not deny that such decision has been or would be made.

(2) The statement on page 2 of the letter is loaded with "negative pregnant".

> "The Board notes that your allegations of discrimination and reprisal in connection with the Commission's failure to find you suitable for employment in the competitive Federal service concern your application for employment with Federal agencies in general, rather that with one Civil Service

> Commission; for this reason, the Board finds that those allegations may not be accepted for processing under part 713 of the Civil Service regulations. In addition, your allegations of discrimination and reprisal on the part of officials of the Office of Economic Opportunity clearly could not be accepted for processing by the Commission's Director of Equal Employment Opportunity or by any office, with the possible exception of the Office of Economic Opportunity."

If not under Part 713, then what paragraph or section in 5 CFR would lead the Commission to respond? What information is being withheld?

Logical questions arise:

> Must the Plaintiff submit an identical complaint except for changing a three-digit part number in the CFR or substituting some other designator, which the Commission has kept secret from the Plaintiff?
>
> Or are the Commission and its employees beyond the Civil Rights Law and immune to complaints and suit?

(3) The Plaintiff further challenges the decision of the Board of Appeals and Review that Part 713 is not applicable. The decision states on page 2:

> "Part 713 of the Civil Service regulations, under which this complaint was filed, covers complaints filed by employees or applicants for employment who believe they have been discriminated against, on the basis of race, color, religion, sex, or national origin, by the agency with whom the complaint is filed, or by employees or applicants who believe they have been the victims of reprisal on the part of that agency for filing previous discrimination complaints."

Item by item:

Plaintiff is an applicant for employment; who believes he has been discriminated against; on the basis of race; by the Agency (the Commission); with whom the complaint is filed (the Commission)

and

Plaintiff is an applicant; who believes he has been a victim of reprisal; on the part of that Agency (the Commission); for filing previous discrimination complaints.

5 CFR PART 713 would appear to fit, precisely.

(4) The Plaintiff challenges the next statement on page 2 of the decision of the Board of Appeals and Review dated 8 May 1974 (Exhibit A):

> "Because you are not an employee of the Civil Service Commission, the only allegations of discrimination or reprisal which might properly be accepted for processing by the Commission's Director of Equal Employment Opportunity would be allegations related to your application for employment with the Civil Service Commission".

Why? On what basis? On what authority is that statement made?

(5) The Plaintiff respectfully alleges that the superficial and at best narrowly technical decision of the Board of Appeals and Review, with its strained tortuous reasoning, replete with the negative pregnant and seeming non-sequiturs, is its own evidence that Plaintiff's complaints of racial discrimination and reprisal are summarily rejected or are ignored and treated with contempt by the Commission, and that no administrative remedy exists to determine their merits.

WHEREFORE, Plaintiff prays:

1. That Plaintiff's resignation from the Office of Economic Opportunity be set aside and Plaintiff awarded judgment for back pay, with both in-grade and grade level promotions that he would have had from October 1968 to the present, less offsets for wages or pay received during that period.

2. That Plaintiff's pay on his present GS-13 position be increased to the particular in-grade step that would most nearly match the pay he would be receiving with the reinstatement and promotions prayed in Prayer 1, above.

3. That the Office of Economic Opportunity and the Civil Service Commission be enjoined to accord him transfer rights identical to those accorded to employees of the Office of Economic Opportunity, now in the process of dissolution.

4. In the alternative, for damages equal to the amount determined under the computation in Prayer 1, above, from the Office of Economic Opportunity, the Civil Service Commission, and other Defendants for racial discrimination during the period August 1968 to the present.

5. In the alternative, for damages equal to the amount determined under the

computation in Prayer 1, above, from the Office of Economic Opportunity, the Civil Service Commission, and other Defendants for reprisals taken against him for filing complaints of racial discrimination, denying him Civil Service employment and opportunity to apply for Civil Service employment.

6. In the alternative, for damages equal to the amount determined under the computation in Prayer 1, above, for violation of the Plaintiff's Veterans' Preference rights to Civil Service employment by denying application for and certification from Civil Service Registers.

7. In the alternative, for damages equal to the amount determined under the computation in Prayer 1, above, for circulating false, derogatory reports about the Plaintiff to hiring agencies and impeding or blocking his employment in the Civil

Service.

8. For an Order to the United States Civil Service Commission to show cause why an injunction should not issue enjoining the Commission:

(a) From taking or permitting any adverse action against Plaintiff until this cause has been heard and decided.

(b) To certify the Plaintiff as suitable and eligible for Civil Service employment and to place his name on Civil Service Registers for positions for which he has or may apply and for which he is otherwise qualified.

(c) To reveal to the Court the contents of both classified and unclassified files and reports on the Plaintiff, and to delete therefrom false, derogatory information prejudicing the Plaintiff's Civil Service employment.

(d) To refrain from, and to

restrain its employees from using their administrative authority to take personal reprisals against the Plaintiff to obstruct or deny him Federal employment in violation of his Civil Rights and Veterans' Preference rights.

9. And for such other and further relief as to the Court may seem just and appropriate.

Respectfully submitted,

Tracy E. Mulligan
Attorney for Plaintiff
416 Hungerford Drive
Rockville, MD 20850
(301) 340-9670

DISTRICT OF COLUMBIA, ss:

Earl R. Brees, being first duly sworn on oath says the foregoing is a just and true statement of the facts, to the best of his information, knowledge, and belief.

/s/
Earl R. Brees, Plaintiff

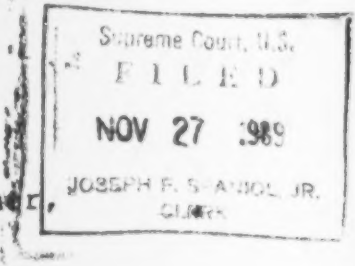
Subscribed and sworn to before me this 27th day of June, 1974.

/s/

Notary Public, D.C.

No. 89-860

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989



EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

APPENDIX - VOLUME 3 of 3
TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 27, 1989

No. 89-_____

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EARL R. BREES,

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Respondents.

APPENDIX - Vol. 3

Testimony of Earl Roland Brees:

MR. MULLIGAN: One of the issues here is whether the BPI acted illegally in refusing to accept the complaints of discrimination 713 in violation of the Civil Rights Act and a violation of the Provision of 5 CFR

76190. We've had testimony that the Bureau of Personnel Investigations has considered itself immune to complaints of racial discrimination. We have testimony from two witnesses in Bureau, if memory serves me correctly, that that is still the position of the Office of the Executive Director and of the Director of the Bureau of Personnel Investigations. If such any judiciations based upon a disregard of Law and Regulations is certainly not a closed issue. It is one of the vital issues before this Hearing.

MR. BUCHOLTZ: Mr. Mulligan misstates the testimony of those witnesses. As the record will show those witnesses testified that under the Regulation as written, an applicant for employment with the Commission that is, an applicant for employment in another Agency does not have a right under part

713 as it was written in 1969, and, indeed, as it was written today, to file a discrimination complaint against BPI. Those employees of BPI certainly do have a right to file discrimination complaints against BPI. Mr. Mulligan did misstate the testimony of the witnesses. And, I believe my objection is valid. I would like it ruled pon, please.

Q. Mr. Brees, have you worked on Computer Systems in the Government during the course of your employment?

A. Yes. I am presently a Senior Computer Specialist GS-0334-13. I also have taught Government auditors, grade 9 through 15 how to audit Computer Systems. I have also taught these courses in college and I have taught in graduate school in a major university with Computer Systems.

Q. With your knowledge of Computer Systems and Government applications and the knowledge of the record keeping system some of which we reviewed during the course of this Hearing, can you state whether it's possible to develop a system in comparison to be required by 713.216 in the investigation of your case?

A. Yes. With the record system of the United States Government that's available, and the fact that the Civil Service Commission has said, that the official personnel folders of each Government Agency is part of the Civil Service Commission's Systems Record, it is possible, I could do this very easily to determine each person who was found eligible or ineligible on Civil Service Registers especially on announcement on 425 WA 707. And, it's possible to determine that throughout the

investigation the criminal record of said person and the race of said person.

Q. Do the records that remain changed with the Bureau of Recruiting and Examining, as introduced here, provide any assistance in the development of such information?

A. Yes, I believe it's Exhibit 14. I'm not sure of the number, for the Government introduced an informal record for it which the Government Regulations would define as a flag.

MR. BUCHOLTZ: Objection. Among that testimony from Mr. Wright as to what a flag was and as to whether or not this, in particular, was a flag. If we are going to have contrary evidence, let's have that evidence as opposed to whose restatement which wasn't even asked for in the --

BY MR. MULLIGAN:

Q. I was going to ask you if you were familiar with the Government as the definition of a flag was stated in FDM supplement internal 731-71?

A. Yes, page 10 of the FDM supplement internal 731-71 issued in March, 1966, says that flagging is renoting the Commission's records to show that there is disqualifying or potentially disqualifying information about a person who should be condiedred in future matters effecting them. Mr. Wright testified that the informal record card was used exactly for that purpose. And, it was used for that purpose in my case.

Q. I show you the Exhibit File, copies that were made available to the Complainant in this Hearing and the direct attachment to those of Mr. Wright. I show this document defining flag to Mr.

Bucholtz.

MR. BUCHOLTZ: Is that from the Exhibit, Mr. Mulligan?

MR. MULLIGAN: This is from the supplement internal 731-71, all of it. This has not been admitted into evidence.

MR. BUCHOLTZ: Is this page in evidence?

MR. MULLIGAN: Not to my knowledge. This is not one of the pages, to my knowledge, that it's in evidence. If you have some information --

MR. BUCHOLTZ: No.

EXAMINER ABLOVE: Is that the BPI internal instruction, Mr. Mulligan?

MR. MULLIGAN: Yes. And, I offer the document in evidence to show the definition of flagging that's defined in the Civil Service Commission Regulations.

MR. BUCHOLTZ: I see no reason why we have to burden the record with the definition of something which the

evidence has shown was not done in this case. Mr. Wright explained what flagging was. Mr. Wright explained that it was done in that case. And, indeed, that information is from BPI and doesn't even refer to BRE.

EXAMINER ABLOVE: Well, since Mr. Brees has already read this definition into the record, we know that it is a part of the internal supplement 731-71, it is not necessary. Is he going to answer your question? You had asked him question previously and I interrupted is answer, you may go on.

MR. MULLIGAN: I directed his attention to those Exhibits, to look at them in preparation for the next qustion as I recall, while I was introducng this document, or attempting to.

I asked Mr. Brees whether or not the documents that are not Exhibits

in a series of Exhibits introduced by Mr. Wright, identified by Mr. Wright, provides assistance, would provide assistance to you in developing statistical information required by 713.216 in this case:

THE WITNESS: Yes, Exhibit 14, the informal card.

BY MR. MULLIGAN:

Q. How does that provide assistance?

A. Exhibit 14 shows that not only is a flag kept in ineligible ratings but also it's kept when someone is found eligible. It shows here in the middle of the page that I had been sent to ID on 10-10-73, suitability determination. And, then the next line says suitable 3/5/75. So, from this, assuming that every person is treated the same, I would be able to identify every person who had been referred under announcement 425, it

says a 425 on this. It would be referred to BPI and I would know from this case that they had been found suitable. From the card, therefore, I would have a list of everybody who had been referred and found suitable. But from the bottom card which is on WA 7-07 received 4/29/68, 51768 suitability 61969 ineligibility suitability. I would know everyone on announcement WA 7-07 who had been found unsuitable by the BPI.

By this information, I would have the list, first of all, of everyone who had been referred, and I would know which ones had been found suitable, which nes ad been found unsuitable. I could then go to the Bureau of Personnel Investigation and I could determine from their investigative files, from their FBI Reports, from the reports they get from other Government Agencys other from the

FBI what offenses that person had been convicted of. The Civil Service Commission receives from the FBI as a part of a normal National Agency check, inquiry FBI information on arrests that have been reported to the Federal Bureau of Investigations by local law enforcment agencys from the reports of the FBI and from the investigative reports themselves, such as Exhibit 10, 16. I could determine what offenses someone had been arrested for and if there was a final disposition what offense they had been convicted of.

Since I already know what register they are from these informal cards, I could then, under the Civil Service Commission directives, because each official personnel folder in each Government agency is part of the main Civil Service Commission system record.

I could go to the Personnel folder of these people and, even if I didn't know this from the informal record card, what announcement they were hired from, from their official personnel folder and from documents in the Personnel Office of each Government Agency, I could determine from what Civil Service Register they were hired, without even having these cards.

And, then the Government's way of identifying the person's race is to look at them. That's exactly what part 713 says. In order to determine the race of each individual, I would simply walk up to them and look at them and see what their race is, and identify them by race.

Q. From these earlier testimonys pertaining to the maintenance of the master file or from Personnel are their instructions, to your knowledge, to show

that race is averaged into the automative data for the records?

A. Yes. Race is entered in almost every automative data system. Department of Commerce has had it since 1967 when they were not allowed to have it back in those days, a race identifier. The Civil Service Commission and its automative personnel file of all Federal employees, not just the ones employed by the Civil Service Commission, has race as an identifier. They also have as an identifier whether or not people have been hired under certain programs for convicted people.

They also have in their automative system where the person is working. So, it would be a simple matter to take the Social Security Account Number, which can be found in the Bureau of Personnel Investigations, for each one

of these people we are looking at, and run it through the Civil Service Commission system and find out in which Government Agency the person worked.

But, it would probably not be necessary to do that because there's a register card associated with each one of these informal cards. So, even if you didn't have the automative system, you could look at the register card and see which certificates these people were put out on and, I would assume if we could get hold of a register card, mine, that I would like to get from announcement 408, that you could tell from the register card, that a person was hired from a particular certificate. I know you can tell from the person's official personnel folder exactly what Civil Service Commission certificate the person was hired from and exactly what

announcement number the person was hired from.

BY MR. MULLIGAN:

Q. Mr. Brees was addressing yesterday the development of statistical information. That could be used to comply with the requirements that information be provided in statistical form for the purpose of comparison of the treatment of members of his race with members of others.

HEARING EXAMINER: Mr. Mulligan, it's not necessary to summarize yesterday's testimony. Just go ahead.

MR. MULLIGAN: I'm introducing this so we can have some orderly connection between yesterday's testimony and today's.

HEARING EXAMINER: I believe we all remember it. You will please just start.

MR. MULLIGAN: I have two documents here which I will show to counsel.

BY MR. MULLIGAN:

Q. I show you these two documents, Mr. Brees, and ask you if you will identify them first.

A. Yes. This one document is what is known as a certificate of eligibles. According to Mr. Wright, the government announcement 408 first puts people in what he calls an inventory. Then he said when they need the talents for certain people, they then put them on a register.

Now in the Civil Service Commission in October 1973, when I was placed on a Civil Service register for announcement 408, I was put under four different inventories. One of these inventories was number 192, which is auditing. Another inventory was 197, which is systems accountant. Another was 027, which is computer systems analyst. Another was 021, which has been identified to me as business applications

and data processing. Therefore, I was in at least three and perhaps four inventories here.

If someone came in and said they wanted an auditor, then the Civil Service Commission would pull all of the auditors who met the particular specifications the agency wanted. They would put my name--and I have been informed that my name was one of them--put into the hopper--on a register. They would rank people in the register with scores. Then they would take the people at the top of that register, depending upon how many positions were available, and they would put them on a certificate of eligibles.

Now this particular case here, this certificate of eligibles which seems to be CSC form 1844--it's difficult to read it. It's called certificate of

eligibles. Shows that I was, in fact, put on register and certificate number WAM-74-0181. This information is also in the Bureau of Recruiting and Examining to be checked in the Civil Service Commission.

Then they have different categories. They have A for selected. My name is on this register, along with six other people. I am the fourth highest from the top, fourth from the top.

Beside my name is the letter "A", which indicates that I was the person who was selected from the Civil Service certificate of eligibles. My score was only ninety-three C.P., which means I am a disabled veteran receiving compensation from the United States.

It identifies here 408 senior level positions, and the vacancy was one systems account GS 510 13 in Washington,

D.C. I was the person hired on this certificate of eligibles by the Office of Education on 14 April 1974 as a systems accountant GS-510 13.

Q. I address your attention to the second document and ask if you can identify that.

A. The second document is a standard form fifty, Notification of Personnel Action, identified as a personnel folder copy, and I received both of these documents from my official personnel folder in the Office of Education. The effective date is 14 April 1974--reinstatement career in the Civil Service of the legal authority under item 14 as WAM-74-0181, which is the same number that appears on the certificate of eligibles as the registering certificate number.

In this way, you can tell from the person's standard form 50 what civil service register they were selected from, if you had to go that far and go from the fifties coming back, or you could look on the certificate of eligibles which is in the personnel folder. Sometimes these things are filed in the personnel office, but, in any event, they must be filed in the personnel office to show the legal authority by which the person was hired. They must be able to substantiate how they hired the person.

Q. Now, with this information, does this provide a link in the chain of developing statistical information as required under 713.216 of 5 CSR?

A. Yes, this provides the link if you do not have the formal register cards that Mr. Wright testified to or the official register card of the United

States Civil Service Commission. You could have this link if you just had the BPI records -- the Bureau of Personnel records and went through those records and determined who had criminal records and who had been referred for suitability. And the government documents show who has been referred for suitability. This is in each person's investigative file, who has been found suitable, who has been found unsuitable.

Q. From these documents, can you determine whether that register identification code and the legal authority for hiring is automated or not automated from the records you have there?

A. It's automated. The standard form 50 was produced by a computer. A human being did not produce this. You can tell by the characters that's on it, plus I have personal knowledge that these things

are produced by computers.

On this standard form 50, under Remarks, there is no requirement subject to satisfactory report of investigation which is required to be put on the standard form 50 when someone is subject to investigation for suitability by the United States Civil Service Commission. The Civil Service Commission has no authority to investigate this appointment for suitability.

* * * *

MR. MULLIGAN: I offer this document in evidence.

MR. BUCHOLTZ: I object to this document. This document goes back to 1961. For whatever purpose Mr. Mulligan wants it, he has had the questions asked. He had had the witness answer them. I don't think we need a document from 1961.

MR. MULLIGAN: The purpose of

the document is to show that, if an appointment is subject to suitability or when Mr. Brees was subject to investigation for suitability, this information was reflected on his appointment document.

MR. BUCHOLTZ: Miss Ablove, it shows that possibly, but that was for 1961. It's irrelevant to this case.

HEARING EXAMINER: He has also testified as to what it contains. I don't think it's necessary. I will not accept that document.

BY MR. MULLIGAN:

Q. Have you received any indication from any government official that, while perhaps inconvenient and expensive, using techniques other than those that you have outlined that it would be possible to have developed statistical information required under

713.216?

A. Yes. In the proposed disposition of June 1976--

Q. I show you--

HEARING EXAMINER: That document is already in the file, if that's the one to which you are referring.

THE WITNESS: In the proposed disposition of of 16 June 1976, Mr. McQuoid, the Deputy Executive Director of the Civil Service Commission has listed in detail exactly how the Civil Service Commission could have developed the statistics.

At the bottom of page two, Mr. McQuoid starts the steps. Number one--

MR. BUCHOLTZ: Objection to the recitation of the steps. The document is in the record.

HEARING EXAMINER: That is correct.

MR. BUCHOLTZ: If they want to be commented on and discussed, that

something else, but there is no reason to read them.

HEARING EXAMINER: That objection is sustained. Mr. Mulligan, I counseled you about this yesterday. The document s in evidence. I will read it. If you have comments to offer, then go ahead and ask questions.

THE WITNESS: How can I compare it if I don't read what it says and compare it?

HEARING EXAMINER: I don't want it read, Mr. Mulligan. You may continue.

BY MR. MULLIGAN:

Q. Will you compare the steps that are whown in this document you have just identified?

A. With Exhibit 14, the informal record care or Exhibit 16, the former register card, I could identify all applicants who applied under these

announcements as Mr. McQuoid has set forth in his letter as step one. I could also identify these applicants by searching the files of the Bureau of Personnel Investigation, because in the files of the Bureau of Personnel Investigation is each CSC form 678, such as is shown in the Government's Exhibit number six, that also identifies in item four the announcement number that's involved. And, in item one--this is a two-part form. The top half is filled out by the Bureau of Recruiting and Examing. The bottom half is filled out by the Bureau of Personnel Investigations. So the bottom half, number ne, tells you whether or not the application in acceptable or whether or not it has been rated ineligible on suitability. So I could determine right then every person--I could identify all

applicants who have applied under any of the announcements that I applied under during the time of my application.

Now the Government as testified that they are required to keep the register cards for five years. Mr. Wright has also stated that the informal record card is destroyed when the formal register card is destroyed. Yet, the government has not brought forth the formal register card that goes with the informal register card that's in Exhibit 14 at the bottom for announcement number WA 707. Otherwise, they kept the informal card, which is a flag for whenever someone applies under this announcement. They automatically check this card according to Mr. Wright, to see whether or not the person has ever been rated on suitability.

After they check this flag at the bottom of Exhibit 14, if the person has been rated ineligible on suitability, they automatically refer the new application to the Bureau of Personnel Investigations. Now when I filed my complaints of discrimination against the United States Civil Service Commission, all these cards existed. When I filed my complaints in 1969, February, April, May, July-- the government had the ability at that time to process and compare every person who had been found eligible or ineligible on the same registers I had applied for. Computer technician, training instructor, accountant, computer systems analyst, et cetera. The government refused to do so.

Now n the process of not complying with part 713, the Government had destroyed the cards for 1969.

Allegedly. And yet, on Exhibit 14 at the bottom we found that the Govenrment kept the card on me as a flag to make sure that if my application ever came through again, I would be referred to BPI.

Now, in 1974, when I filed a complaint of racial discrimination on the 20th of January 1974, that is not a part of the 713.216 investigative file and which has not been processed for the United States Government at all. The Government was able at that time to freeze, at least from January '74 back to January '69, given their five-year destruction period. So in January 1974, the Government was able to determine all applicants who applied nder the announcement I applied under during the time of my applications for the period January 1969 through 28 March 1969 when I was declared ineligible by the Bureau of

Personnel Investigations. So these cards did exist. That takes care of point one.

And two of Mr. McQuoid's way of developing statistics, because from this you could determine which of the applicants were subjected to suitability investigations and determinations.

Exhibit 14, the informal register card, at the bottom, for announcement WA 707, shows that I was referred on 17 May 1968 for suitability, and has a date of 19 June 1969 ineligible suitability.

The card above that, announcement 425, which is a successor register for announcement WA7907 for accountant and auditor, shows that they sent an application for accountant under announcement 425 for the I.D. investigations I guess, on 10/10/73 for suitability determination.

Now Mr. McQuoid is to determine which applicants were subject to suitability investigations and determinations. This care in the middle of Exhibit 14 shows that I was referred for suitability determination, shows hat on 5 March 1975 I was declared suitable. Now this card, if it's kept for five ears, would still be available to compare me with every person who applied under announcement 425 and who was referred for suitability determination and the answer back. Also, the Exhibit 56, the CSC Form 678, records the same information which would be in the Bureau of Personnel Investigations and in the Bureau of Recruiting and Examining when they send it back.

And, from this, you could also determine which of the applicants subjected to the investigations for

determination were rated suitable and which were rated unsuitable, which is Mr. McQuoid's point three on page three of his une 1976 proposed disposition.

In order to determine which of the applicants were ex-offenders and the nature of the offense and the positions applied for--you have already established the positions applid for and, given the comprehensive investigative file that I have and Exhibits 10 and 16 of the 713.216 investigative repor, it's possible that, from that and the FBI reports, to determine who is an ex-offender, the nature of the offense, and you already know the position they applied for, plus in their nvestigative file is going to be CSC forms 678, such as in Exhibit 6, which will tell you every position that this particular person applied for.

It's right in the investigative file.

Now, to determine the race of the applicants or ex-offenders, once you've established all this information, and, of course, the informal record cards and the formal register cards, such as in Exhibit 16 and Exhibit 14, do not show social security account number, but the records in the file of the Bureau of Personnel Investigations do show social security account numbers. So you could get that information at that time.

So now you would have from the Bureau of Recruiting and Examining and from the Bureau of Personnel Investigations -- you would have the person's social security account number. The date of birth, person's name, the announcement and, from the BPI files, you would have the offenses, the disposition of the offenses. Then you could go to

the Civil Service Commission's central automated personnel system. You could run through the system of the social security account number. In fact, you could do it with a name. You don't need the social security account number. It's just more efficient to do it with a number. And you could determine where all these people worked.

Now, to determine the race of the applicants, you could simply go to each agency because the personnel records in each agency is part of the Commission's system of records. And you could probably identify the person by asking supervisors or, if you couldn't find the supervisor to ask the race of the individual, you could go to the individual himself or herself, and look at them, and you would then determine the race of the applicants who were ex-offenders.

Q. Would it be possible to determine race also from the automated system of records?

A. Yes. From the automated system, they have a category--a minority group category. And you could determine the race of the individual from the automated system. So you wouldn't even have to leave the Civil Service Commission to determine that.

And the automated system--I've spoken with the person who works on it--and they are capable of going in the automated system and extracting the data that I have mentioned. And they can tell you the race of every one who is in it, and where everyone works.

Q. All right then. Does this establish then that this statistical data could be compiled in the way you have described it?

HEARING EXAMINER: Mr. Mulligan, he's just described it. That's a conclusory question even though counsel for the Agency hasn't said anything. That's an unnecessary question. Go on. Ad. Rec. 2117-2133 filed October 1977.

Testimony of Ronald M. Van Tuyl at Deposition, November 15, 1977:

BY MR. CARLSON:

Q Could you state your name for the record?

A. My name is ronald M. Van Tuyl, Jr.

Q. Could you give us your home address?

A. My home address is 7007 Churchill Road, McLean, Virginia.

Q. Your present position?

A. U.S. Department of Commerce.

Q. Within that, your position?

A. An investigator with the Office of Investigations & Security.

Q. At GS level?

A. 12.

BY MR. MULLIGAN:

Q. Do you recall testifying in a previous hearing involving Mr. Brees?

A. Yes, I do.

Q. At that time certain questions were asked pertaining to the identification of people you had talked with in the Civil Service Commission. Do you recall that?

A. Yes, I do.

Q. Do you recall the answers you gave at that time?

A. Yes.

Q. What were your answers at that time?

A. Perhaps you could refer specifically to instances you are referring to. As I recall, there were at least two names that we did not disclose at that time.

Q. Why did you at that time not disclose these names?

A. Excuse me.

THE WITNESS: At that time the names were not disclosed because I had

been advised by our general counsel that we did not have to reveal the identities of those two people under one or more provisions of the Privacy Act.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE UNITED STATES ATTORNEY

WASHINGTON, D.C. 20001

IN REPLY, PLEASE REFER TO
INITIALS AND NUMBER

EJS:PCS:cmp

Cl. #74-0324 C

January 10, 1975

Anthony L. Mondello, Esquire
General Counsel
United States Civil Service
Commission
1900 E Street, N. W.
Washington, D. C. 20415

Attention: Joyce Evans, Esquire
Deputy Assistant General Counsel
Litigation Division

Re: Earl R. Brees v. Robert R. Hampton
Civil Action No. 74-972

Dear Mr. Mondello:

Please be advised that with respect to the above-captioned case, we have reviewed the litigation report and pertinent portions of the administrative record. Based on that review, we

recommend that the Appeals Review Board accept a remand on the issue of the voluntariness of plaintiff's, Earl R. Brees, August 6, 971, resignation from the Office of Economic Opportunity. We believe that the decision of the Appeals Examiner's Office, affirmed by the Board of Appeals and Review, not to entertain Mr. Brees' complaint is not in accord with the law in this jurisdiction. It appears settled that a "coerced resignation is, in substance, a discharge effected by adverse action of the employing agency," and that "when the Commission's relieving authority is invoked by nonfrivolous allegations of coercion, the Commission should entertain the appeal and hear and determine the allegations." Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1965). Accord Goodman v. United States, 424 F.2d 914

(D.C. Cir. 1970); Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966).

In addition, we recommend that the Bureau of Personnel Investigations complete, at the earliest practicable date, their study on plaintiff's suitability for Federal employment. As you may recall on September 26, 1974, at a conference in Peter Schaumber's office, Mr. Schaumber asked George Mattox of BPI to explore the possibility of completing the study. Mr. Mattox indicated that he would do so and that the study could be completed within a relatively short period of time.

A status conference is presently scheduled for February 7, 1975, before the Honorable William B. Bryant. If a remand cannot be agreed upon, and the study completed, we are not at all confident, in view of the Court's denial

of our previous motion to dismiss, that we can avoid a trial de novo and eventual production of the investigative file.

Please advise us of your decision as soon as possible. In closing, we wish to thank you for your continued prompt assistance in these matters and the very thorough litigation report provided us by Murray Meeker of your office.

Sincerely yours,

EARL J. SILBERT
United States Attorney

By:
Arnold T. Aikens
Chief, Civil Division

Form 86 Case Serial No.
U.S. Civil Service Commission 502368 4207

SECURITY INVESTIGATION DATA
FOR SENSITIVE POSITION

INSTRUCTIONS - Prepare in triplicate, using a typewriter. Fill in all items. If the answer is "No" or "None" so state. If more space is needed for any item, continue in item 28.

1. Full Name BREES EARL ROLAND

* * * *

Before signing his form check back over it to make sure you have answered all questions fully and correctly.

CERTIFICATION

I CERTIFY that the statements made by me on this form are true, complete, and correct to he best of my knowledge and belief, and are made in good faith.

False statement on this form is punishable by law.

(date) (signature) sign original and first carbon

INFORMATION TO BE FURNISHED BY AGENCY

INSTRUCTIONS TO AGENCY: See Federal Personnel Manual Chapter 736 and FPM

Supplement 296-31, Appendix A, for details on when this form is required and how it is used. If this is a request for investigation before appointment, insert "APPL" in the space for Date of Appointment and show information about the proposed appointment in the other spaces for appointment data. The original and first carbon copy should be signed by the applicant or appointee. Submit the original and the unsigned carbon copy of the form, Standard Form 87 (Fingerprint Chart), and any investigative information about the person received on voucher forms or otherwise, to the United States Civil Service Commission, Bureau of Personnel Investigations, Washington, D.C. 20415. If this is a request for full field security investigation, submit these forms to the attention of the Division of Reimbursable Investigations: if this is a request for preappointment national agency checks, submit these forms to the attention of the Control Section.

RETAIN THE CARBON COPY OF STANDARD FORM 86 (SIGNED BY THE APPLICANT OR APPOINTEE) FOR YOUR FILES)

DATE OF APPOINTMENT	TYPE OF APPOINTMENT
8-27-67	competitive
CIVIL SERVICE REG. NO. OR OTHER APPOINTMENT AUTHORITY	**TITLE OF POSITION AND GRADE**
315.501	Systems Acct. GS-12

DEPARTMENT OR AGENCY	DUTY STATION
Office of Economic Opportunity	Washington, D.C.

SEND RESULTS OF PREAPPOINTMENT CHECK TO:

G.T. Willis, Jr., Security Officer
Office of Economic Opportunity
Washington, D.C.

This Is A Sensitive Position

/s/ G.T. Willis, Jr.
(Signature and Title of Authorized Agency Official)

Federal Personnel Manual (FPM), Chapter 306, Subchapter 7 - Employment of Public Offenders.

7-1. GENERAL

This subchapter covers programs for Federal employment of public offenders. Section 7-2, Rehabilitated Offenders, describes the program for Federal employment of community residents with past records of convictions who are judged to be rehabilitated. Section 7-3, Work Release, describes the program for Federal employment in the community of selected inmates of Federal and District of Columbia correctional institutions.

7-2. REHABILITATED OFFENDERS

a. Policy. It is the policy of the Federal Government to hire, carefully and selectively, rehabilitated offenders for jobs where they are needed and for which they are qualified by education, training, and competitive

examining procedures. This policy stems from the belief that employment opportunity for the rehabilitated offender is an effective tool in the national effort to prevent crime. It provides the Federal Government with an additional source of manpower and enables the rehabilitated offender to become a working, tax-paying citizen.

b. Background. * * * *

c. Program implementation.

* * * *

(1) The Commission and the employing agencies will accept applications from persons who have records of criminal convictions and will consider for employment those adjudged to be rehabilitated.

(2) For all positions in the Federal service each case must be judged on its own individual merits. This means

that the Commission and appointing officials will take into account such matters as:

--Nature and seriousness of the offense.

--Circumstances under which it occurred.

--How long ago it occurred.

--Age of person when he committed the offense.

--Whether the offense was an isolated or repeated violation.

--Social conditions which may have contributed to the offense.

--Any evidence of rehabilitation demonstrated by good conduct in prison or in the community, or book, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional

work-release programs, and the recommendation of persons who have or have had the applicant under their supervision.

--The kind of position for which the person is applying.

(3) In administering the merit system the objective is that persons with records of criminal convictions who are attempting to obtain employment in the Federal service receive, on an individual basis, mature and sophisticated evaluations, taking into consideration the social and humane need for their employment as the final step in the rehabilitation process, as well as the requirements of the positions for which they apply.

(4) Felony offenders, after suitability determination, may be employed while they are still on

probation or parole. All cases will be decided on their own merits taking into account the nature of the position for which application is made. (A felony is defined as any crime for which the court has mposed a prison term exceeding one year and there has been some period of actual confinement under the sentence.)

(5) * * * *

Federal Personnel Manual, Chapter 306, Subchapter 7

7-3. WORK RELEASE

a. General. Employment is vital to the ultimate completion of the rehabilitation process. The need to work, to belong, to take pride in accomplishment is as representative of persons still in prison as it is of the general population. Recognizing this, Congress enacted legislation authorizing Federal and District of Columbia prisons to establish programs whereby selected inmates could be employed by Federal agencies on work-release in jobs for which a local recruiting shortage exists. The programs were set up under the Prisoner Rehabilitation Act of 1965 and the District of Columbia Work Release Act of 1966.

* * * *

(1) * * * *

(e) Work-release ordinarily shall be limited to approximately the six months immediately preceding release or parole eligibility; however, when used to complement institutional training programs or to provide prisoner income, work-release may be for longer periods of time;

* * * *

(2) * * * *

(d) Continued employment after release from custody. To permit continuing employment of the employee after his release from custody, the excepted appointment effected or extended under section 213.3102(x) prior to the appointee's release may continue in effect for no more than one year after his release from custody. This will provide a period of trial employment upon which

to base suitability and other determinations for later consideration for appointment under regular competitive examining procedures. After release from custody, these excepted employees should apply for competitive appointments under regular examining procedures and suitability standards. * * * *

June 30, 1975

Honorable Rex E. Lee
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Lee:

REMAINDER OF PAGE DELETED WITH FOLLOWING NOTATION:

Portions deleted not relevant to the complainants allegations regarding the Rehabilitated Offender Program.

We would also emphasize that even if the Commission's regulations provided for the processing by the Commission of EEO complaints from employees or applicants for employment with other agencies, it is doubtful that the plaintiff would prevail on his EEO complaint in the absence of a showing by him that the rehabilitated offender program, as implemented by the defendants in this action, is racially discriminatory. (We are appending a copy of a Commission report, dated June 28, 1974, which discusses the rehabilitated offender program. The appendices have been omitted.) It would seem that in order to establish his claim, the plaintiff would have to show that others similarly situated, i.e., Blacks who committed similar offenses and applied for similar positions received appointments, while the plaintiff did not.

The Government does not maintain statistics which would indicate the racial backgrounds of individuals who, subsequent to their being convicted of criminal offenses, became employees of the Federal Government, nor does the Government maintain any racial data based on the rehabilitated offender program. (See page 6 of the appended June 28, 1974 report.) Thus, even if a hearing were granted, neither the Government--nor presumably the plaintiff--would be able to present any meaningful evidence, statistical or non-statistical, concerning the employment of former public offenders in the Federal Government.

signed 6/30/75
Anthony L. Mondello
General Counsel

MEMORANDUM

Subject: Earl Roland Brees v. Robert E. Hampton, et al., USDC D.D.C., Civil Action No. 75-0178

From: Carl F. Goodman
General Counsel

TO: Edward A. Dunton
Deputy Executive Director

Herman D. Staiman, Chairman
Appeals Review Board

Attached is a letter received from the Assistant United States Attorney who is handling this case. We have been corresonding with Mr. Schaumber, the Assistant United States Attorney, over an extended period of time regarding the possibility of the Commission's accepting a remand of Mr. Brees' appeals. One appeal pertains to his allegation that is resignation from OEO was coerced; the other to his allegation that the Commission discriminated against him by

delaying his suitability determination. This second allegation has two nderalying premises. The first is, that under the rehabilitated offender program, black felons are rated suitable and hired for Government employment whereas he, a white misdemeanant, was non considered suitable. The second is that the Commission delayed his suitability determination as a reprisal for discrimination complaints which he filed.1/

PORTIONS DELETED NOT RELEVANT TO DISCRIMINATION COMPLAINT.

1/ The Commission recently rated Mr. Brees as suitable.

PORTIONS DELETED NOT RELEVANT TO DISCRIMINATION COMPLAINT.

In denying the discrimination complaint, the Commission relied on he rationale that Mr. Brees was neither an employee of the Commission nor an applicant for employment with the Commission. This argument is, of couse, untenable and the Commission now has before it a proposal to amend the regulations to provide for acceptance of complaints by non-Commission employees who allege that they were discriminated against by an action of the Commission.

Ad. Rec. 3366 - filed October 1977.

42 U.S.C. §2000e-16. Nondiscrimination in Federal Government employment.

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies is defined in section 105 of title 5, (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches

of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b)-(e) [Unchanged]

(As amended, Feb. 15, 1980, P.L. 96-191, §8(g), 94 Stat. 34.)

* * *

(c) Civil Action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order

11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

UNITED STATES CIVIL SERVICE COMMISSION
Federal Employee Appeals Authority
Washington, D.C. Field Office
Washington, D.C. 20415

November 7, 1974

SPECIAL MESSENGER-RETURN RECEIPT
Mr. Guy W. Chamberlin, Jr.
Acting Director of EEO
U.S. Department of Commerce
Room 5830
14th & Constitution Avenue, NW
Washington, D.C. 20230

Dear Mr. Chamberlin:

This is in response to your letter of October 15, 1974, received in this office October 18, 1974, wherein you requested the appointment of an EEO Complaints Examiner to hear the discrimination complaint filed on February 25, 1974 by Mr. Earl R. Brees, an applicant for employment with your agency.

We have reviewed the discrimination complaint file submitted with your request and conclude it would be

inappropriate to assign an Examiner to conduct a hearing at this time. Therefore, we are returning the complete complaint file to your office for further processing in accord with the applicable Civil Service regulations.

Specifically, Section 713.216(a), Part 713 of the regulations concerning investigation of complaints of discrimination provides in pertinent part:

> "The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the

> complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision in the complaint shall, if available, be recorded by name in the investigative file...If necessary, the investigator may obtain information regarding the membership or non-membership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information."

Our review of the complaint file establishes that in his March 21, 1974 letter acknowledging acceptance of Mr. Bree's complaint (IR, Ex. 17), EEO Officer Clyde E. Ahrnsbrak defined the sole issue accepted by the agency for

processing as:

> "You alleged that the Office of Personnel Office of the Secretary, Department of Commerce has discriminated against you because of race in that the Office of Personnel refused to hire the Complainant - - - a convicted Caucasian misdemeanant - - - in a temporary position by applying standards other than those used to judge convicted Negroes."

Mindful of the above, our review of the complaint file establishes that the case is in improper regulatory posture in that it does not include information reflecting upon the treatment received by complainant and members of his group as compared to treatment received by persons outside his group. We therefore remand the case to your agency for supplemental investigation to rectify this deficiency.

We suggest that the investigator assemble and include in the investigative report

information concerning all occasions during the two year period prior to the filing of the instant complaint wherein the Office of Personnel, Office of the Secretary of Commerce, has processed applications for temporary employment filed by convicted individuals. Said information should establish the race of each applicant, the general nature of the conviction, the type of position applied for, whether a temporary appointment was subsequently effected, and the circumstances surrounding each appointment or non-appointment. Affidavits should then be obtained from knowledgeable individuals with respect to any appointments or non-appointments which appear to require detailed explanation.

Following completion of the supplemental

investigation, the case should be processed anew from the point of the informal adjustment attempt, including, if appropriate, the issuance of a new proposed disposition which pointedly informs complainant whether or not support has been found for the allegation. We shall then be pleased to handle a new request for the appointment of an Examiner, should it be necessary to continue the discrimination inquiry process.

Returned herewith is the complete complaint file.

Sincerely yours,

John H. Taylor
Acting Chief Appeals Officer

UNITED STATES CIVIL SERVICE COMMISSION
Federal Employee Appeals Authority
Washington, D.C. Field Office
Washington, D.C. 20415

February 28, 1975

SPECIAL MESSENGER-RETURN RECEIPT
Mr. Guy W. Chamberlin, Jr.
Acting Assistant Secretary
for Administration
U.S. Department of Commerce
Room 5830
14th & Constitution Avenue, NW
Washington, D.C. 20230

Dear Mr. Chamberlin:

By letter dated February 12, 1975 you were notified of my assignment as EEO Complaints Examiner to hear the discrimination complaint filed with your agency by Mr. Earl R. Brees, an unsuccessful applicant for employment.

I have scheduled the hearing for 9:00 A.M. Tuesday March 18, 1975. Please immediately advise me of the hearing room location and inform me of the identity of

the agency representative.

The person selected to represent the agency should submit to me by March 7, 1975 a letter listing the names of witnesses necessary to the agency's presentation at the hearing, accompanied by a general indication of the testimony relevant and material to the complaint issue which each can be expected to provide. Enclosed for the agency representative's information are a copy of the discrimination complaint hearing procedures and a diagram of the desired hearing room layout.

My review of the complaint file establishes that in his March 21, 1974 letter acknowledging acceptance of Mr. Brees' complaint, EEO Officer Clyde E. Ahrnsbrak defined the sole issue accepted by the agency for processing as:

> "You alleged that the Office of Personnel, Office of the Secretary, Department of Commerce has discriminated against you because of race in that the Office of Personnel refused to hire the Complainant --- a convicted Caucasian misdemeanant --- in a temporary position by applying standards other than those used to judge convicted Negroes."

It is apparent that a full and fair adjudication of the allegation accepted by the agency requires that the complaint file include evidence reflecting upon the treatment received by members and non-members of complainant's group (Caucasians) with respect to the action complained of. Thus, the file must include statistical information concerning the agency's prior record in appointing to temporary positions non-Caucasians possessing conviction records of which the agency had prior knowledge.

It is my determination that the supplemental investigation conducted by the agency in response to the November 7, 1974 remand of this matter by the ACting Chief Appeals Office, Washington Field Office, Federal Employee Appeals Authority, does not adequately rectify the deficiency of the initial investigation. Accordingly, the individual selected to represent the agency is hereby requested to deliver to me, not later than March 11, 1975, three copies of a listing of all instances during the two year period prior to the filing of the instant complaint wherein the Office of Personnel, Office of the Secretary of Commerce, has effected the temporary appointment of individuals possessing a conviction record of which the agency had knowledge prior to

effecting apppointment. To protect the privacy of those individuals who are included in this category, proper names shall not be used; however, the race of each appointee, the general nature of each appointee's conviction record, the type of position to which appointment was effected, and an explanation by knowledgable individuals of the circumstances surrounding the agency decision to effect appointment, should be clearly set forth. I emphasize that my request is made only with respect to (1) the race (2) of those individuals possessing conviction records (3) who received temporary appointments (4) effected by the Departmental Personnel Office (5) during the two ear period prior to the filing of the instant complaint (6) when the Personnel Office possessed knowledge of the conviction

record of the appointee prior to the time appointment was effected.

Although the specific method through which the agency might choose to gather information in response to this request remains a matter of agency discretion, it is suggested that the agency identify those applicants whose personnel files are presently readily accessible who received temporary appointments; review their employment applications and/or review the Departmental Office of Investigations and Security and the Departmental Rehabilitated Offender Program files reflecting upon those who received temporary appointments, to identify those who admitted convictions n their employment applications or whose convictions were brought to the attention of the Department prior to the effective

date of their appointments; and determine the racial identity of convicted appointees through the agency's minority group statistics reporting system, thorough voluntary identification by appointees themselves if presently employed by the Department, or through reported observations by appointee's knowledgeable coworkers.

The accuracy of the agency submission should be certified to by an appropriate official of the Department.

Sincerely yours,

/s/

Gregory V. Morrow, Jr.
EEO Complaints Examiner

EVIDENCE OF REHABILITATION BY EARL ROLAND BREES

May 67 Committed a misdemeanor for which he was convicted; the judgment in October 1967 was imposition of sentence suspended, one year probation.

8 Jun 67 Accepted employment with the Federal Government as an Accountant, GS-9.

27 Aug 67 Transferred from the Bureau of Land Management (BLM) to the Office of Economic Opportunity (OEO) with a promotion to Systems Accountant, GS-11. [His supervisor at BLM wrote that Mr. Brees "functioned as an Operating Accountant under my direct supervision", that Mr. Brees was "highly" proficient in his work and

conducted himself with professional decorum at all times", that "nothing in his work habits or attitude indicated that he was other than a conscientious trustworthy employee", and that "if a vacancy was available in my organization for which Mr. Brees was qualified, I would have no hesitancy in reemploying him". This gentleman was well aware of the difficulty Mr. Brees had in May 1967.]

Sep 67 Enrolled in graduate work at night at the American University. Received the degree of Master of Arts in Public Administration: Technology of Management

[Computer Systems and Management Information Systems] on 21 August 1970.

22 Oct 67 Promoted by OEO to Systems Accountant, GS-12, for outstanding work. [OEO admitted in July 1968 and November 1969 that Mr. Brees "consistently performed his work at a high degree of professional competence", that he was an "extremely hard worker and dedicated to his job", and that his supervisor wanted to promote him rather than discharge him because he was an outstanding employee.]

Feb 68 Taught computer programming at night from February 1968 to ay 1969 in addition to attending graduate school and

working as a Systemns Accountant, GS-12.

Apr 68 Training: Civil Service Commission; Apr-May 1968; Field Work Program in ADP Systems Analysis.

May 68 Recommended for a Quality Increase in Compensation for outstanding work.

6 Aug 68 Removed from probation prior to the completion of one year. The Government did not attempt to get a written report from his probation officer [even though FOM 731-8, Subchapter 2-4b(2), required that they consider such a report in a suitability determination] because the probation officer had given him a highly favorable oral recommendation; the probation office and OEO

approved is appointment as the COMPTROLLER of an OEO-funded organization where he would be handling approximately $100,000.

13 Jul 70 Successfully completed a four-hour comprehensive examination in Computer Systems for a master's degree.

15 Jul 70 Successfully completed a four-hour comprehensive examination in Management Information Systems for a master's degree.

Aug 70 Completed all the requirements for a Graduate Certificate in Computer Systems from the American University with an A-average.

21 Aug 70 Received the degree of Master of Arts in Public Administration: Technology of

Management [Computer Systems and Management Information Systems] after completion of 39 semester hours and two comprehensive examinations. Began this program in September 1967.

UNITED STATES GOVERNMENT

MEMORANDUM Date: 7/7/71

SUBJECT: Request for Investigation of Discrimination Complaint by Mr. Earl R. Brees

FROM: Stanley N. Taylor, Chief
Division of Adjudication and Appraisal

TO: Kimbell Johnson, Director
Bureau of Personnel Investigations

This is in response to your request for an analysis of the posture of the Brees case and the current request for investigation of his complaint by James Frazier, Jr.

First, I find it rather sad that so much money is being wasted on this case. As you will recall, this Division found Mr. Brees neligible for Accountant, for Senior Level Positions, for Digital

Computer Systems Analyst, and for Computer Technician on March 5, 1969.

My decision was appealed to you and to the Board of Appeals and Review, and my adverse decision was sustained. Mr. Brees has asked the Commissioners to reopen the case and they have refused.

The facts in the case are relatively simple. Mr. Brees attempted to embezzle more than $80,000 from a travel agency in 1967. He actually was successful in transferring that money to is wife's bank account but when he attempted to draw checks against it, an alert bank official became suspicious and the fraud was discovered. The charge was reduced to false pretense nasmuch as Mr. Bres never successfully converted the money to his own use and he was forced to make

restitution. To my knowledge, Mr. Brees has never expressed the slightest remorse over his crime--to the contrary he has taken a very belligerent attitude towards everyone in OEO and CSC who raised any question about his conduct. His chief regret seems to be that he never got to spend the money he stole, and his major activities seem to be to prove that he was discriminated against by both the Civil Service Commission and the Office of Economic Opportunity.

In light of thea bove-recited facts, it is difficult for me to nderstand the memoranda of Counselor Wilmer S. Hunt and Counselor Frank C. Kent who considered the case from the standpoint of racial discrimination.

Mr. Hunt states in his memorandum, inter alia:

> "This means that Mr. Brees has now been tried and cleared twice of the same charge by at least three separate levels within the Federal System:"
>
> and
>
> Certainly, this man should never have to be judged again on this score. Even the supreme law of the land allows that men can not be tried twice for the same crime."

I can only conclude that both Mr. Hunt and Mr. Kent are abysmally ignorant of the law and of the Civil Service Act, Rules and REgulations and the regulations governing discharges from the Federal Service.

Actually, Brees was tried and found guilty by the U.S. District Court for the District of Columbia. He was convicted and sentenced for his crime. Fortunately for him, the udge exercised nusual restraint and laced him on probation

instead of sending him to prison.

Neither OEO nor the Commission "tried" Mr. Brees in the sense used by Mr. Hunt. The agencies were determining his fitness to serve. In both instances the agencies decided, quite properly, I believe, that he was unfit to serve. That decision was affirmed by the highest appellate body in the Commission.

Unfortunately OEO was rather inept in effecting Mr. Brees' separation. On the first "go round" they made a procedural error and they were reversed by our Appeals Examining Office. On the second "go round" they made another procedural error by dismissing his discrimination complaint and again the case was remanded to the agency.

It is absolutely asinine to state that Brees has been "cleared" by anyone. The Commission never got around to adjudicating Brees' dismissal from OEO on the merits.

As to Mr. Brees' reformation and rehabilitation, many doubts assail me. He has shown himself, in my opinion, to be utterly unscrupulous--falsifying documents and twisting the statements of CSC and OEO officials. You may recall that on one occasion he had to be ejected from this office by the guards on your orders when he became utterly unruly and threatening towards Mr. Gillum, the Assistant Chief of this Division. We have every reason to believe that Mr. Brees adjusted the filing dates of his several applications to make it appear that he filed before he was formally

convicted of false pretense.

Under all the circumstances, I do not see what is to be gained by investigation of Mr. Brees' discrimination complaint. OEO avers that Mr. Brees is not satisfied that OEO will be impartial in its investigation. Does anyone consider it likely t hat he will be satisfied that the Commission will be impartial in its investigation? We have already ruled against him at the highest level. If we ndertake an investigation, I can forsee only more complaints that the Commission is not impartial. And Mr. Brees will pursue such allegations with his usual tenacity.

With respect to the investigation itself, what will the investigator seek to establish? Mr. Brees has made a very

convicted of false pretense.

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With respect to the investigation itself, what will the investigator seek to establish? Mr. Brees has made a very

vague charge that there are black felons employed in OEO, and that he was discharged only because he is white. Should the investigator go around OEO asking whether there are any black embezzlers still serving in fiduciary positions? Even if he found one, which is extremely unlikely, it would not prove discrimination. Every case is rated on its own merits, and it is impossible to find two cases exactly the same.

It may be that we have no choice in he matter, and that we have to undertake the investigation. In that event, I suggest that before we begin, all of the facts recited above be called to the attention of Mr. Frazier and Mr. Rosen, so that they will be prepared for the usual avalanche of complaints that will issue from Mr. Brees. It might also be well to

call in an investigator from one of our regional offices so that when he is finished he can disappear from the scene. If a Washington investigator handles the investigation, it is likely that he will be subjected to abuse and harassment by Mr. Brees.

In re-reading the file I am struck by the thought that it would have been cheaper for OEO to pay Mr. Brees his regular salary to stay home and let them go about their business. Isn't that a sad commentary on how our appeals system can be perverted by one determined individual?

[Ad Rec., filed 5 October, 1977, p. 3281-3283.]

Title 5 C.F.R., January 1, 1969

§713.214 Investigation.

The Equal Employment Opportunity Officer or his designated representative shall promptly investigate the complaint. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. When gross data collected under Subpart C of this part will not provide the specific information needed to resolve a complaint of discrimi-

nation on the basis of race, creed, color, or national origin; the Equal Employment Opportunity Officer or his representative may collect the required data by asking each employee concerned to provide the specific information needed to resolve a complaint of discrimination on the basis of race, creed, color, or national origin, the Equal Employment Opportunity Officer or his representative may collect the required data by asking each employee concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information. The agency shall furnish the complainant and his representative opportunity to review the investigative file or shall furnish the complainant and his representative a written summary which contains all the information in the investigation material to the resolution of the

complaint. [Emphasis supplied.]

§713.215 Informal adjustment of complaint.

The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file or a written summary of the investigation.

§713.216 Hearing.

(a) Offer of hearing. When the complaint is not adjusted on an informal basis, the agency shall offer the complainant an opportunity for a hearing in connection with his complaint to be held at a convenient time and place.

* * *

(c) Conduct of hearing. The hearing officer or committee shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the hearing

officer or committee shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or an employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the representative of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Witnesses at hearing. The agency shall make its employees available as witnesses at a hearing on a complaint, upon a showing satisfactory to the hearing officer or committee of reasonable necessity therefor, when the complainant makes such a request and it is administratively practicable to comply with the request. Reasons for the denial of a request for the appearance of employees as witnesses

shall be documented in the record of the complaint. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

Title 5 C.F.R., January 1, 1973

§713.216 Investigation.

* * * * The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organization segment in which the alleged discri-

mination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. [Emphasis supplied.]